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Nos. 346 and 347

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.

SOCONY-VACUUM OIL COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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No. 346

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v.

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v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 2488) is reported in 23 F. Supp. 937. The opinion of the Circuit Court of Appeals (R. 3911) is reported in 105 F. (2d) 809.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 27, 1939 (R. 3953–4). The petition for

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writ of certiorari in No. 346 and the cross-petition for writ of certiorari in No. 347 were filed in this Court on August 31, 1939. Both petitions were granted on October 16, 1939. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Criminal Appeals Rules.

QUESTIONS PRESENTED

In December 1936 an indictment was returned in the United States District Court for the Western District of Wisconsin charging various corporations and individuals with violating section 1 of the Sherman Act. The jury returned verdicts of guilty against 16 corporations and 30 individuals. The district court granted some of these defendants a new trial upon the ground that there was "good reason to believe" that they had not had "an adequate separate consideration of their defense" (R. 2490), and it granted or purported to grant others judgment *non obstante veredicto*.[1] The remaining 12 corporations and five individuals against whom verdicts of guilty were sustained[2] are the respondents in No. 346 and the petitioners in No. 347. They will be referred to herein as defendants or, when appropriate to distinguish between them and the other defendants brought to trial, as respondents.[3]

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[1] See *United States* v. *Stone*, 60 Sup. Ct. 177.

[2] The trial court fined each of the corporations $5,000 and each of the individuals $1,000 (R. 2501–2).

[3] The names of the corporate respondents and the abbreviated titles by which they will be referred to are as follows:

Socony-Vacuum Oil Company, Inc. (Socony-Vacuum).
Wadhams Oil Company (Wadhams).
Empire Oil & Refining Company (Empire).

On appeal by respondents to the Circuit Court of Appeals for the Seventh Circuit, that court rejected several of the errors assigned and found it unnecessary to pass upon others,[4] but it reversed the judgments of conviction upon the ground that the trial court had erred in its instructions to the jury (R. 3939–41) and in its rejection of certain defense evidence (R. 3941–2),

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Continental Oil Company (Continental).
The Pure Oil Company (Pure).
Shell Petroleum Corporation (Shell).
Sinclair Refining Company (Sinclair).
Mid-Continent Petroleum Corporation (Mid-Continent).
Phillips Petroleum Company (Phillips).
Skelly Oil Company (Skelly).
The Globe Oil & Refining Company (Oklahoma) (Globe).
The Globe Oil & Refining Company (Illinois) (Globe).

The following persons are the individual respondents:

C. E. Arnott, vice president of Socony-Vacuum.
H. T. Ashton, manager of Lubrite Division of Socony-Vacuum.
R. H. McElroy, Jr., tank-car sales manager of Pure.
P. E. Lakin, general sales manager of Shell.
R. W. McDowell, vice president in charge of sales of Mid-Continent.

It should be noted that Wadhams is a subsidiary of Socony-Vacuum (R. 3–4, 2596) and that the two Globe companies are affiliated (R. 726).

[4] It held that the district court had jurisdiction of the proceeding (R. 3942–4), that there was no failure of proof as to any essential allegation of the indictment (R. 3936–8), that there was sufficient evidence to go to the jury that defendants' combination unreasonably restrained trade (R. 3938–9), and that if the district court had committed any error in the admission of evidence, respondents were not prejudiced thereby (R. 3944–5).

The court said that it was unnecessary for it to decide whether denial of respondents' motions for a new trial constituted reversible error (R. 3945) and whether certain remarks of Government counsel in argument to the jury had deprived respondents of a fair trial (R. 3950).

and, *semble,* upon the ground that the Government counsel's use of the transcript of grand jury proceedings to refresh the recollection of certain hostile witnesses constituted prejudicial error (R. 3945–8).

The Government's petition for certiorari (No. 346) presents the following questions:

(1) Whether the District Court erred in instructing the jury that if it found that the defendants had combined for the purpose of raising and fixing gasoline prices in the manner charged in the indictment and that the defendants had the power so to raise and fix prices, their restraint of trade was unreasonable and unlawful.

(2) Whether the district court erroneously excluded material, relevant evidence.

(3) Whether Government counsel's use of transcripts of grand jury proceedings to refresh the recollection of hostile witnesses constituted error and, if so, whether this was prejudicial error.

(4) Whether any remarks by Government counsel in argument to the jury had the effect of depriving respondents of a fair trial.

The additional questions presented by respondents' cross-petition (No. 347) are:

(5) Whether the indictment charges and the evidence establishes an offense within the jurisdiction of the United States District Court for the Western District of Wisconsin.

(6) Whether there was a variance between the indictment and the proof constituting a failure of proof.

(7) Whether there was sufficient evidence to go to the jury that defendants' combination unreasonably restrained trade.

(8) Whether denial of respondents' motions for new trial violated any right of jury trial guaranteed by the Constitution.

STATUTE INVOLVED

Section 1 of the Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., title 15, sec. 1), known as the Sherman Act, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

A general outline of the conspiracy and of the underlying industrial facts pertinent thereto

This case involves an alleged conspiracy on the part of major oil companies selling 85% of all gasoline sold in a marketing region in the Middle West, known in the

oil industry as the Mid-Western area,[8] to raise, fix, and maintain gasoline prices in that area. The gist of the conspiracy charged is that gasoline prices in the Mid-Western area are directly based upon and determined by the price of gasoline on the Mid-Continent spot market; that the defendant major oil companies, in order to raise gasoline prices in the Mid-Western area, agreed among themselves and with the independent refiners in the Mid-Continent oil field[9] to buy from these refiners under such circumstances as to price and volume and source of purchase that this buying and the resulting curtailment of the spot market supply would raise Mid-Continent spot market prices to the level desired by the defendant major oil companies and would maintain them thereat once this level had been reached.

The conspiracy also involved a like program of concerted buying by defendant major oil companies from independent refiners in the East Texas oil field, for the purpose of bringing about price increases and price levels on the East Texas spot market corresponding to those achieved, through artificial buying support, on the Mid-Continent spot market. The reason for engaging in this supplementary and auxiliary East Texas buying program was that the tank car freight

[8] The area consists of 10 States, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, North Dakota, South Dakota, and Wisconsin. The Mid-Western area is also frequently referred to as Standard of Indiana territory, Standard Oil Co. (Indiana) being the price leader in the ten States in question.

[9] This oil field is located in Oklahoma, southeastern Kansas, southern Arkansas, northern Louisiana, and northern and western Texas (R. 181).

rate on gasoline shipments from the East Texas field[1] to points in the Mid-Western area is only about 1/8¢ a gallon higher than from the Mid-Continent field (R. 358, 733). Accordingly, if East Texas spot market prices consistently remained more than 1/8¢ a gallon below Mid-Continent spot market prices, jobbers in the Mid-Western area who ordinarily purchased on the Mid-Continent spot market would turn to the East Texas spot market as a source of supply, with a resulting depressing effect on Mid-Continent spot market prices. The East Texas buying program thus constituted an important and almost necessary step to assure the success of the combination to raise and control Mid-Continent spot market prices and, in turn, wholesale and retail prices in the Mid-Western area.

Before describing the conspiracy in further detail, certain facts concerning the major oil companies' marketing operations in the Mid-Western area and concerning the gasoline price structure therein should be set forth, since it is only against a background of these facts that a clear picture of the character and effect of the defendants' conspiracy can be obtained. It should be understood that the facts about to be stated refer to those existing in the Mid-Western area during the period of the conspiracy charged in the indictment, February 1935–December 1936, and that the word "majors", used as a noun, will mean the defendant major oil companies.

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[1] This is a highly productive field 50 miles long and 10 miles wide located in the middle eastern part of Texas (R. 181, 1114).

A major oil company is one whose operations in the petroleum business are fully integrated. It produces crude and owns pipe lines for shipping the crude to its refinery or refineries located near a region of large consumption (R. 185–6, 996). It also has both the physical facilities and the contractual relationships requisite for effectively marketing, at retail and at wholesale, the gasoline output of its refineries.

The majors sell most of their gasoline through retail service stations (R. 1379). To supply these stations, the majors maintain bulk storage plants adjacent to local marketing areas. Gasoline is shipped by tank car or tank truck (called tank wagon) from the major's refinery to one of its bulk storage plants and is then delivered by tank trucks to service stations (R. 185). During the greater part of the indictment period the majors owned and operated many of these stations, but with the advent of chain store taxation in certain States they quite generally adopted the policy of leasing their stations to others (R. 177, 253–4, 1233). However, these and other so-called "independently operated" service stations usually handle exclusively the products of just one supplying major, carry its insignia, receive various free services from it, and the price which they pay for the gasoline handled is the tank-wagon price fixed by the supplying major (R. 253, 1380). Generally speaking, therefore, each major retains control over the retail price of its gasoline.

Standard Oil Company (Indiana), hereinafter referred to as Standard of Indiana, is the price leader throughout the Mid-Western area (R. 176–7, 800–1).

It has been customary for retail distributors, whether independent or owned or controlled by majors, to follow Standard of Indiana's posted retail prices (R. 176, 252, 254, 291, 325, 328). Its posted retail price in any given locality in the Mid-Western area is computed by taking the Mid-Continent spot market price and adding thereto the tank car freight rate from the Mid-Continent field, taxes, and 5½¢ (R. 1234–5), the 5½¢ being the equivalent of the customary 2¢ jobber margin and 3½¢ service station margin (R. 253).* Thus the retail price structure throughout the Mid-Western area during the years 1935 and 1936 was based upon the Mid-Continent spot market quotations (R. 1234–5, 1252–4).

Standard of Indiana's posted retail prices are regarded as the "normal" retail prices and all lower retail prices are regarded as "subnormal" (R. 1237). When service stations handling gasoline other than that of majors sell at subnormal prices and compel Standard of Indiana or other majors to reduce their prices to meet this competition, prices are restored to "normal" (i. e., to prices bearing a fixed relationship to the Mid-Continent spot market price) as soon as the competition ends (R. 1244). What is even more striking, when subnormal prices prevail in a given locality and Standard of Indiana raises or lowers its "normal"

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* Because of the impracticability of changing retail prices on account of small or temporary fluctuations in spot market price, Standard of Indiana changes its retail prices only if there has been a change of 3/10¢ in the spot market price, continuing for at least seven days (R. 1235).

price, the subnormal price rises or falls by a corresponding amount (R. 1255).[9]

Apart from service station sales, sales to jobbers constitute the next most important outlet for the majors' gasoline (Ex. 1028, R. 3813–4). The Mid-Continent spot market fixes the price in these sales even more directly and definitely than in the case of service station sales.

The jobber performs the function of middleman or wholesaler. He maintains bulk storage plants, purchases gasoline in tank-car lots for shipment to his storage plant, and then resells to service stations, making delivery by tank wagon (R. 185). Most of the jobbers purchase their gasoline from a major. A few purchase from independent refiners. If the jobber purchases from a major he is compelled to enter into a contract running for a year or longer which requires him to purchase his supplies exclusively from the contracting major.[10] *Over 85% of the majors' jobber contracts provided that the price of gasoline sold thereunder should be the Mid-Continent spot market price on the date of shipment,* the contracts further provid-

[9] The underlying reason for thus basing prices on the Mid-Continent spot market is because the price in this market determines the cost of most of the competitive gasoline (i. e., gasoline other than that of majors) sold by service stations, the Mid-Continent independent refiners being the principal source of supply for such competitive gasoline (R. 1233–4).

[10] Respondents in their brief in the court below (Appendix A, pp. 9–10) conceded that the majors' jobber contracts covered "all the jobber's requirements of gasoline for a year or more." The present record contains for the most part only the *price* provisions of typical jobber contracts. See, however, R. 999; Exs. 615 (R. 3022), 624 (R. 3046), 625 (R. 3051).

ing that this spot market price was to be determined by averaging the high and low spot market prices reported in the Chicago Journal of Commerce and Platt's Oilgram or by averaging the high and low prices reported in the Journal alone (R. 339–40).[11] The contracts also contained provisions which had the effect of partially protecting the jobbers' customary 2¢ margin.[12]

The majors market about 85% of all the gasoline sold in the Mid-Western area, the remaining 15% being the product of Mid-Continent or East Texas independent

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[11] The contracts do not use the word "Mid-Continent." Most of them define the price to be paid as the "f. o. b. Group 3, Oklahoma," spot market price published in the trade journals. A few contracts define the price to be paid as the "f. o. b. Group 3" spot market price published in the Chicago Journal of Commerce (Exs. 615 (R. 3032), 616 (R. 3029), 623 (R. 3043), 624 (R. 3048)). Group 3 is a freight rate district covering the most productive portion of the Mid-Continent field, the freight rate being the same from any point within Group 3 to the same northern destination (R. 184, 734, 1398).

The contracts referred to Group 3 spot market prices because the prices in the trade journals are quoted on this basis. The Chicago Journal of Commerce publishes spot market price for Group 3 (R. 401, 1661). Platt's Oilgram publishes spot market prices for refinery districts, the Oklahoma district being the equivalent of Group 3 (R. 733, 1576, 1661). For convenience, the prices thus quoted will be referred to herein as the Mid-Continent spot market prices reported in the trade journals.

[12] The usual provision was that if Standard of Indiana's "normal" service station price at point of destination was not 5½¢ a gallon greater than the price to the jobber so determined, plus the freight rate from the Mid-Continent field to point of destination, the price to the jobber should be reduced by one-half the difference. In some of the contracts, the major assumed the full amount of the difference. See Exs. 618–621, 623–640; R. 3031–80.

Of the 5½¢ margin, 3½¢ represented the customary service station margin. See Exs. 631 (R. 3064), 638 (R. 3077).

refiners.[13] Since the latter sell only one-third to one-half their output on the spot market, the Mid-Continent and East Texas spot markets account for only 5% to 7½% of the gasoline consumption in the Mid-Western area (R. 189). With wholesale and retail prices in this area based upon the Mid-Continent spot market, the price structure is a kind of inverted pyramid and an increase in the Mid-Continent spot market price brings a corresponding increase in price in transactions at least 13 times greater in volume. The majors, who do 85% of the business in the Mid-Western area, are the ones who principally profit or lose when price changes on the Mid-Continent spot market occur.

As to the means adopted by the majors to raise spot market prices—the purchase by them of a large proportion of the output of independent refiners—the defendants made no serious attempt to show any legitimate business reason for the acquisition of most of this gasoline. With two or three possible exceptions,[14] the various majors had excess refining capacity, that is, they could refine more gasoline than they were able to market (R. 999), and their large gasoline storage facilities (R. 1010, 1013, 1028) enabled them to draw upon

[13] R. 188, 1084. In 1935 the majors' sales were a little over 82% of total consumption. Exs. 947 (R. 3639), 1028 (R. 3813).

[14] Pure's crude production exceeded its refining capacity and it therefore contracted with certain major oil companies to have them refine part of Pure's crude, Pure paying for this service and receiving the gasoline so refined (R. 1134–5, 1146). Sinclair and Skelly may have also been unable to refine their full market requirements. In 1935 and 1936 Sinclair's purchases were about 7% to 9% of its sales (Ex. 879, R. 3465) and Skelly's were about 8% to 10% of its sales (R. 853).

inventory to meet unexpected increases in demand. It is not surprising, therefore, that the majors when they formed their combination expressly recognized that the purchases from independent refiners which they agreed to make would be a "burden," although it was also recognized that this burden, being distributed among them all, would not be serious as to any one major (Ex. 376, R. 2978).[15]

The nature of the Mid-Continent spot market prices which the trade journals report requires some explanation. Prices reported were the maximum and minimum prices at which gasoline was sold to jobbers[16] f. o. b. Group 3 (i. e., f. o. b. a refinery in the Mid-Continent field, see *supra,* note 11, p. 11), in a sale for immediate or prompt delivery, at a definite price for the particular transaction agreed upon at time of sale (R. 731–4, 769–70). Majors sell very little gasoline to jobbers on this spot basis and the spot market

[15] Most of the defense evidence on gasoline purchases by majors is not informative because it does not show sources of purchases over a period of years. An exception is Ex. 739 (R. 3226–9), which gives Pure's purchases for the years 1931–1936 (a) from Mid-Continent and East Texas independent refiners and (b) from all other sources. It shows that while Pure's purchases from all other sources remained relatively substantial and stable, its purchases from independent refiners were nominal prior to 1934, averaged about 400,000 gallons a month in 1934 (when certain major company buying programs were temporarily in effect, *infra,* p. 38), and averaged during the conspiracy period over 1,000,000 gallons a month for the last 10 months of 1935, and over 1,400,000 gallons a month for the year 1936. [The averages stated are computed from the figures set forth in Ex. 739.]

[16] Quotations in Platt's Oilgram are based solely on sales to jobbers; those in the Chicago Journal of Commerce are based on sales to jobbers and to industrial consumers (R. 1656).

prices published in the trade journals are based entirely upon sales by independent refiners (R. 189, 735–7, 792).

Independent refiners are companies engaged solely in refining gasoline and having no pipe lines or distribution outlets of their own (R. 185, 996). Their refineries, unlike most of those of majors, are located in an oil-producing field and they market their gasoline by selling it f. o. b. the refinery in tank-car lots (R. 183, 185, 996–9). They supply the jobbers who do not operate under exclusive-dealing supply contracts with majors and, through the medium of these jobbers, they supply the service stations which sell gasoline other than that of majors (R. 188, 204). From one-half to two-thirds of their output is sold to jobbers under supply contracts [16a] and these contract sales are not considered spot market sales (R. 189, 732).[17]

The conspiracy and the most important facts concerning the business involved in or affected by the conspiracy have now been outlined. Two things should be noted at this point. First, the business facts heretofore stated are not, as we understand, substantially disputed by respondents. Second, our statement of the conspiracy has ignored the concluding allegations of paragraph 24 of the indictment that the trade journals were

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[16a] These jobbers supply contracts, like the jobbers supply contracts made by majors, generally provided that the price to be paid by the jobber should be based upon the spot market prices reported in the trade journals. Respondents expressly so conceded in their brief (p. 12) in the court below.

[17] Independent refiners also sell to brokers. Since brokers buy for resale to jobbers or consumers at the spot market price, brokers will purchase only if they can buy at ⅛¢ to ¼¢ below the spot market price (R. 175–6, 178, 746). Independent refiners, of course, also sell to majors when and if the latter are willing to buy from them.

guilty participants in the conspiracy, for the reason that these allegations were not sustained by the proof. They will be discussed later (*infra*, pp. 138–145) in answering respondents' contention, which the court below rejected (R. 3936–8), that these allegations of paragraph 24 were essential elements of the offense charged and that the failure to prove them therefore constituted a fatal failure of proof.[15]

The formation, nature, and objectives of the Mid-Continent buying program

The conspiracy for which respondents were convicted had its inception in a meeting held in Chicago on January 4, 1935, called by respondent Arnott, a vice president of Socony-Vacuum, and attended exclusively by representatives of major oil companies (R. 1167–9).

[15] The indictment named as defendants, in addition to the majors marketing gasoline in the Mid-Western area and various officers and employees of these majors, the corporation publishing the Chicago Journal of Commerce and its petroleum editor, the corporation publishing Platt's Oilgram and its president, and a third corporation, affiliated with the Oilgram, which published a weekly compilation of spot market prices (R. 4–5, 7). The last sentence of paragraph 24 alleges that these five defendants, for the purpose of aiding the other defendants in effectuating the conspiracy set forth in the indictment, knowingly published as spot market prices the very prices which the majors paid in their concerted buying from Mid-Continent and East Texas independent refiners (R. 16–7).

One of the trade journal defendants (Fanshier) was not brought to trial (R. 73–4) and at the close of the Government's case the indictment was dismissed, on motion of the Government, as against the other four trade journal defendants (R. 902, 2471–2).

The Government's position as to these allegations of paragraph 24 is that they were superfluous except with reference to the guilt of the particular trade journal defendants (*infra*, pp. 138–145).

The meeting was one of a series called to consider elimination of retail price wars,[19] but at this meeting those present saw fit to embark upon a discussion of the desirability of raising spot market prices and the whole level of gasoline prices in the Mid-Western area.[20] Arnott appointed a committee, which was later called the Tank Car Stabilization Committee, consisting of one representative of each of eight majors, to consider "ways and means of establishing and maintaining an active and strong tank car market on gasoline."[20]

The Tank Car Stabilization Committee and certain additional representatives of majors held meetings on February 5, 1935, and February 11, 1935 (R. 1178–9, 1186), and at these meetings the conspiracy now before this Court was formed. Defendant Bourque, secretary of a trade association of Mid-Continent independent refiners,[21] came to the first meeting with a compilation listing the independent refiners currently producing socalled "distress" or "surplus" gasoline and the amount of each such refiner's "surplus" production (R. 1179). At the second meeting a revised compilation

[19] The code for the petroleum industry approved under the National Industrial Recovery Act provided for a Planning and Coordination Committee representing the industry to cooperate with the federal administrative officials "as a planning and fair practice agency" for the industry (Ex. 710, R. 3163–4). Arnott was chairman of one of its subcommittees, called the Marketing Committee. In July 1934 the Petroleum Administrator requested Arnott, as chairman of the Marketing Committee, to assist in attempting to eliminate retail price wars (Ex. 891, R. 3487–8). From time to time he called meetings to discuss the problem as it affected a wide marketing area (R. 1689).

[20] R. 1168–9, 1696–7; Ex. 876, R. 2977.

[21] The membership of the association included majors, but 80% of its members were independent refiners (R. 1179).

prepared by Bourque was presented and discussed (R. 1187). It was agreed that the majors would embark upon a continuing program to lift all such gasoline off the market and that, to accomplish this, each would purchase the "surplus" of one or more specified independent refiners, these purchases to be made at what the majors termed the "fair going market price."[22] Bourque was to report at the beginning of each month the estimated "surplus" which Mid-Continent independent refiners would produce during the coming month (R. 1190, 1195, 1218). A committee of three (called the mechanical subcommittee) was appointed to supervise and direct the buying program and to advise the majors as to the prices which they should pay in carrying out their commitment to purchase at not less than the going market price.[23]

At the time these meetings were held Mid-Continent spot market prices were depressed by "hot" gasoline (i. e., gasoline manufactured from crude produced in violation of State proration laws) coming from East Texas (R. 1177). The flow of this gasoline, selling at low prices, had greatly increased following the decision of this Court on January 7, 1935 (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388), holding unconstitutional the section of the National Industrial Recovery Act under which interstate transportation of "hot" gasoline had

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[22] R. 1182–4, 1186–8; Exs. 177 (R. 2733–4), 376 (R. 2978).

[23] R. 404, 1189–90, 1199; Ex. 376, R. 2977. Each member of this committee, as composed at the time the conspiracy went into operation, was an officer or employee of a major, with his office headquarters in Tulsa, Oklahoma (R. 356, 362, 382, 384).

been prohibited by the President (*ib.*). The Tank Car Stabilization Committee agreed that until this flow was stopped the majors could not succeed in raising Mid-Continent spot market prices, but it was expected that a bill pending before Congress to prohibit interstate transportation of "hot" gasoline would be shortly enacted and that the interstate sale of this gasoline would then be stopped (R. 1180, 1184–6, 1192). Accordingly, it was decided not to put the program into operation until this bill had been enacted and had been implemented by appropriate enforcement machinery (*ib.*). It was left to Arnott to give the signal for putting the program into operation after this had occurred (R. 1191–2).

This postponement of action until the price-raising objectives of the defendants could be effectively achieved shows how completely price raising and price control lay at the very heart of the conspiracy. It also shows that defendants were unwilling to take any action to aid independent refiners at the time when the latter were most seriously affected by low spot market prices.

The Connally Act (49 Stat. 30) became law on February 22, 1935. The Federal Tender Board, the enforcement agency under this act, was appointed about March 1 and issued its first tenders on March 4 (R. 1199, 1512). On March 1 Arnott and Ashton, both officers of Socony-Vacuum (*supra*, p. 3), explained the buying program to a meeting of Mid-Continent independent refiners in Kansas City (R. 1192, 1703–4). The refiners agreed to cooperate with the majors and appointed a committee to attend a Tank Car Stabilization Committee meeting to be held in St. Louis on March 5

(R. 1705). This meeting was held, with the committee of independent refiners present at the morning session (R. 1193, 1195). At the March 5 meeting final details of the Mid-Continent buying program were worked out, including the allocation of particular independent refiners to particular majors (a relationship referred to as "dancing partners" R. 439–40, 1188).[24] Following the meeting Ashton telephoned Arnott, the latter advised that the plan be immediately put into effect, and on March 7 the mechanical subcommittee went into action (R. 1199–1202, 1706).

The three members of the mechanical subcommittee divided up the task of keeping each of the purchasing majors informed as to the gasoline which it was contemplated that it would purchase, in fulfillment of its part of the buying program. One member would convey this information to companies A, B, and C, and another to companies D, E, and F (R. 384–7, 1200). All three members were in frequent contact with the purchasing companies (R. 391–3, 451–3, 454–5, 1206, 1216). The committee met whenever its members "could get together, and whenever there was distress gasoline to consider," sometimes as often as three times a week and at other times not for 10 days, but a good deal of business was worked out over the telephone without meeting (R. 1205–6).

At the very outset the subcommittee concerned itself with price. On March 14, at its second meeting, the

[24] R. 362, 367, 369–71, 382–3, 1193–8. The allocations were, of course, not arbitrary, but the various majors, after discussing the problem among themselves, volunteered to assume responsibility for purchasing the future "surplus" production of one or more specified independent refiners (*ib.*).

members "arrived at what we thought was a fair market price for the week following." These prices, 3¾¢ for third-grade gasoline and 4¾¢ for regular gasoline, were then reported to the various purchasing majors (R. 409).[25] Price recommendations were made at least five times, and possibly eight times, up to June 7, 1935, the last price recommendation made that year, and each time the "recommended" prices constituted a price advance of either ⅛¢ or ¼¢ over the previous recommendation (R. 412, 416, 500). During this period the spot market prices published in the trade journals stepped up nine times, each step representing an advance of ⅛¢ a gallon (see chart, *infra*, p. 29). Following the last recommendation the spot market price remained stabilized at the level then reached throughout the balance of the year (R. 458–9). Never before in the history of the industry had there been a period when spot market prices had remained stationary over an extended period of time.[26] When the majors advanced the price of crude in January 1936, the subcommittee members, after discussing the price situation, recommended to the majors that they advance their price for gasoline purchased under the program by ½¢ a gallon (R. 459–60). The published spot market price then advanced by the amount of this recommendation (R. 460).

The independent refiners were actively cooperating with the mechanical subcommittee in advancing spot market prices. On March 9, 1935, a representative of one of the majors wrote his company as follows concern-

[25] On the following day one of the subcommittee members wrote his company: "Our Committee decided on a price of 3¾¢ for third grade, and 4¾¢ for 'Q,' for next week" (Ex. 682, R. 3112).

[26] R. 223, 238, 247–8, 280–2, 317.

ing a conference with Winget, one of the independent refiners present at the meeting of the Tank Car Stabilization Committee on March 5, 1935 (Ex. 176, R. 2732):

> I have been in touch with Mr. Winget of Cushing Refining and Gasoline Company who tells me he feels that prices should move faster—*that prices discussed should be reached by the 11th,* and is quoting today, 3⅝ and 4⅝¢ on low and middle octane respectively.[27]

The Tank Car Stabilization Committee, following the meeting on March 5, 1935, continued to meet around the end of each month to consider Bourque's survey of the estimated "surplus" production during the coming month and to agree upon how this should be divided up among the purchasing majors (R. 397–400). The last of these meetings was on February 27, 1936 (R. 400). By this time the plan had become self-operative, the mechanical subcommittee kept in touch with the majors by telephone, and further meetings of the Tank Car Stabilization Committee were considered unnecessary (R. 468, 1208).

The majors regularly reported to Bourque, the trade association representative of the Mid-Continent independent refiners, who actively cooperated with the mechanical subcommittee, the volume of their purchases under the program and the prices paid.[28]

The evidence shows that the "dancing partner" arrangement, that is, the commitment to absorb the "sur-

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[27] In this brief all italics are, unless otherwise indicated, supplied.

[28] Exs. 102–118 (R. 2703–16), 230–231–C (R. 2823–6), 490–508 (R. 3000–16); also Exs. 811–814–B (R. 3302–9), as explained in counsel's stipulation R. 901, Ex. 820 (R. 3316).

plus" of a particular independent refiner or refiners, was the result of allocations or assignments collectively agreed upon in fulfillment of the joint undertaking to raise and maintain prices, and that much of the gasoline purchased under the program was regarded as, and was known to be, not needed and economically disadvantageous.

Purchases in the course of the program were repeatedly characterized by representatives of one of the majors as "allocations," "obligations," and "quotas."[29] The same company considered itself a "guardian" of the company from which it was buying (Ex. 93, R. 2697), referred to that company as "one of the babies placed in our lap last spring when this thing [the buying program] was inaugurated" (Ex. 122, R. 2720), and wrote that "we don't have much choice as to whose material we are to take when we purchase outside third grade gasoline in connection with the Buying Program Committee's operations. On such purchases we have refiners 'assigned' to us" (Ex. 124, R. 2722).

Several of the majors cancelled or declined to enter into profitable arrangements for the exchange of gasoline with other companies in order to participate in the program.[30] Skelly lost a pipe-line transportation profit of 1/16¢ a gallon "on every car of gasoline" taken in the program.[31] Both Skelly and Wadhams continued to purchase gasoline in the program although unable to dispose of it.[32]

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[29] Exs. 95 (R. 2699), 96 (R. 2699), 98 (R. 2701), 101 (R. 2702–3), 112–118 (R. 2713–6), 120 (R. 2716–8), 124 (R. 2722).

[30] Exs. 86–88 (R. 2694–6), 334 (R. 2964), 489 (R. 2999).

[31] Exs. 94 (R. 2697–8), 120 (R. 2716–8).

[32] Exs. 95, 96 (R. 2699), 335, 336 (R. 2965–6).

The formation, nature, and objectives of the East Texas buying program

The normal market for gasoline refined in East Texas is the State of Texas and the Atlantic seaboard (reached through tanker shipments from Gulf ports), but any weakness in East Texas spot market prices makes East Texas gasoline competitive with Mid-Continent gasoline in the Mid-Western area and affects Mid-Continent spot market prices.[33] In the meetings at which the Mid-Continent buying program was organized the defendants recognized that, if they were to attain their objectives, action would have to be taken to prevent East Texas gasoline from becoming a disturbing market influence.[34]

Early in 1935 an association of East Texas independent refiners was formed for the purpose of inducing majors to purchase a substantial part of the gasoline production of its members and Buckley, an employee of a major, was requested to undertake this task (R. 1127–9). He did so after first securing the approval of his employer.[35] In the course of an eastern trip he explained the project to Arnott on February 11, 1935 (R. 574). Arnott at first reserved judgment but later arranged three meetings of representatives of majors operating in East Texas, one on February 25, one on

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[33] R. 644, 1714–6; Exs. 185 (R. 2747), 279 (R. 2915), 280 (R. 2918).

[34] Exs. 177 (R. 2734), 376 (R. 2977). See also Ex. 69 (R. 2655–6).

[35] R. 568–9, Exs. 14 (R. 2615–7), 36 (R. 2635). The major continued his regular salary while he was engaged in this special work, nominally in behalf of East Texas independent refiners (R. 578–9).

March 6, and one on March 15, at which he and Buckley presented the plan for concerted purchasing by majors of the product of East Texas independent refiners.[36] The call for the two March meetings came in the form of telegrams from Arnott. The telegrams summoning the meeting of March 6 stated that its purpose was "to consider future action surplus gasoline this and other groups that is awaiting our decision" and that attendance was a "matter of extreme importance" (Ex. 482, R. 2996). The telegrams summoning the meeting of March 15 urged attendance and advised: "The question of surplus gasoline which has been under consideration must be finalized tomorrow" (Ex. 17, R. 2619).

Both in its organization and in its operation the East Texas buying program followed closely the pattern of the Mid-Continent buying program. The question of the amount of gasoline which the East Texas buying program would involve was discussed at the meeting of March 6 and before the next meeting on March 15 Buckley obtained this information (R. 579–80, 1718; Ex. 69, R. 2655–6). At the latter meeting Sinclair's representative "arose with a slip of paper in his hand" and suggested that each of 12 to 15 majors "take so much gasoline, the amounts being read off as to what each company would take" (R. 582).[37] Every

[36] R. 575–6, 579, 581–2, 1709–11, 1717, 1720.

[37] While the buying commitments entered into at this meting were not final because most of those present stated that they would have to consult higher officials or their manufacturing departments (R. 583), substantial buying under the program in fact began in March (R. 649–50, 663–4).

Monday the secretary of the East Texas association ascertained from each member how much of its forthcoming weekly gasoline production it wished to sell to majors (R. 596, 639). Majors were requested to purchase at the "fair going market price" and purchases were consistently made at the going spot market price (R. 590–1; 602, 628). Arnott continued his active aid and support after the program got under way.[38]

The Sus and Ruether reports of the February meetings of the Tank Car Stabilization Committee

Our statement of the conspiracy has been assembled from the testimony of witnesses, nearly all of whom were closely identified with the defendants, and from documentary evidence, nearly all of which dealt with only partial or limited aspects of the conspiracy. This method of presentation, although necessary for completeness, carries with it the danger that it may fail to reproduce faithfully the spirit and objectives animating those who formed the conspiracy. Fortunately, there are two items of documentary evidence which remedy this deficiency. One is a contemporaneous report of the Tank Car Stabilization Committee meeting of February 5, 1935, by Ruether and the other a contemporaneous report of the Committee's meeting of February 11, 1935, by Sus.

The reports have almost equal significance, but only one need be quoted at length. The report of the meeting of February 11, 1935, was made by Sus, Sinclair's representative at this meeting (R. 1866–7; Ex. 376,

[38] Exs. 19 (R. 2620), 21 (R. 2624), 23 (R. 2625), 369 (R. 2976); R. 1723, 1726–7.

R. 2977–8). It reveals the chief features of the conspiracy—the purpose to raise Mid-Continent spot market prices; the buying program as a means to this end, that is, the purchase by majors of all gasoline produced by independent refiners which they labeled "surplus"; the recognition that this "surplus" affected the Mid-Western area; guidance and control of the prices which majors would pay for gasoline purchased under the program; recognition that the total amount required to be purchased was the equivalent of only 2% of the majors' production and that, with all majors sharing in the obligation to purchase, "no great burden would fall upon any one"; the concurrent East Texas buying program, which would serve to prevent this market from being a "disturbing influence" on prices in the Mid-Western area.

The report reads as follows:[39]

> A committee at a previous Stabilization Meeting had been appointed of which Mr. Bob McDowell was Chairman to consider *ways and means of establishing and maintaining an active and strong tank car market on gasoline.*
>
> This committee rendered a report to the effect that *a movement is under way which will take the East Texas surplus gasoline off the market so that it will not be a disturbing influence in the Standard of Indiana territory.* It was stated that this East Texas gasoline would move to the Gulf and then go to either the East Coast or for export.

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[39] Of the paragraphs omitted, one states that the majors' purchases would be reported in the Chicago Journal of Commerce and the other deals with Sinclair's selection of its dancing partner.

A survey by the committee then indicated that the *surplus gasoline, which would affect the Standard of Indiana territory only,* amounted to 600 cars per month involving fifteen refining companies.

A report is attached which lists the refineries in the Mid-Continent Field who will have surplus gasoline. This report shows their capacity, their crude runs, their allocation, etc.

The program of the committee involves *fourteen major companies, each selecting one or more of these fifteen small refining companies, and the major company obligating itself to take whatever surplus gasoline this small refining unit will have from time to time.* In other words, a major company would select from among the fifteen small refineries some company whose surplus or distress gasoline it could advantageously move, and in that way *by dividing up* these fifteen companies and *these estimated 600 cars per month* of distress gasoline *no great burden would fall upon anyone.*

A steering committee would guide and control, periodically the prices to be paid for this surplus gasoline by the major company to the small refinery. There was considerable discussion to the effect that *this new program had more chance of success than any previous program because of the way the steering committee would function and the fact they would be buying on an ascending market,* thereby keeping the market both active and strong, rather than buying on a descending market as previous buying movements had been and which previous movements had failed of any substantial success.

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It was estimated that the *absorption of these 600 cars per month by fourteen major refiners would only be equivalent to curtailing their own crude runs 2%.* In other words, it was intended to point out that the absorption of this gasoline by a major would not seriously affect that major's own runs.

* * * * *

The meeting in question was attended by all of the major companies, including such companies as Globe, Skelly, Mid-Continent, etc., *all of whom indicated a willingness to select one of the companies shown on the attached statement and assume responsibility for their surplus.*

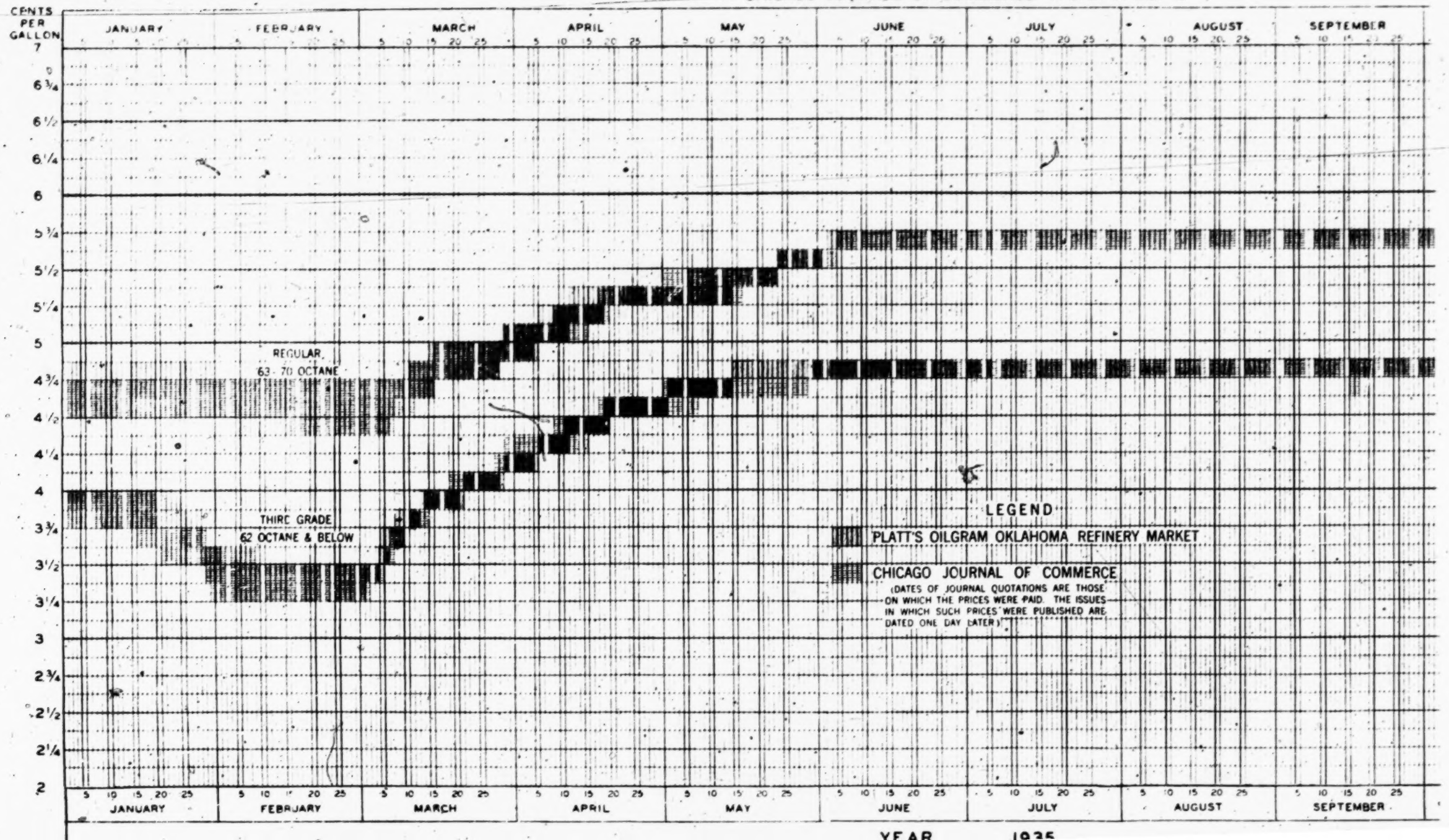
The only important feature of the conspiracy not expressly spelled out in the foregoing report is that the defendants' ultimate objective in raising Mid-Continent spot market prices was to bring about a corresponding rise in prices in the Mid-Western area. This aspect of the conspiracy is set forth in unmistakable terms in the report which Ruether, one of Shell's representatives at the meeting of February 5, 1935, made concerning this meeting (Ex. 177, R. 2733–4). These paragraphs read:

The effect of lower tank car markets for gasoline *on the retail price structure,* was discussed—particularly, low octane, since this grade controlled, Mr. Jackson[40] stated, the Indiana's policy in fixing the retail price.

* * * * *

[40] Mr. Jackson was vice president in charge of sales of Standard of Indiana (R. 5; Ex. 1, R. 2597–8).

COMPOSITE OF
PRICE QUOTATIONS
PLATT'S OILGRAM OKLAHOMA REFINERY MARKET
AND
CHICAGO JOURNAL OF COMMERCE F. O. B. GROUP 3



YEAR 1935

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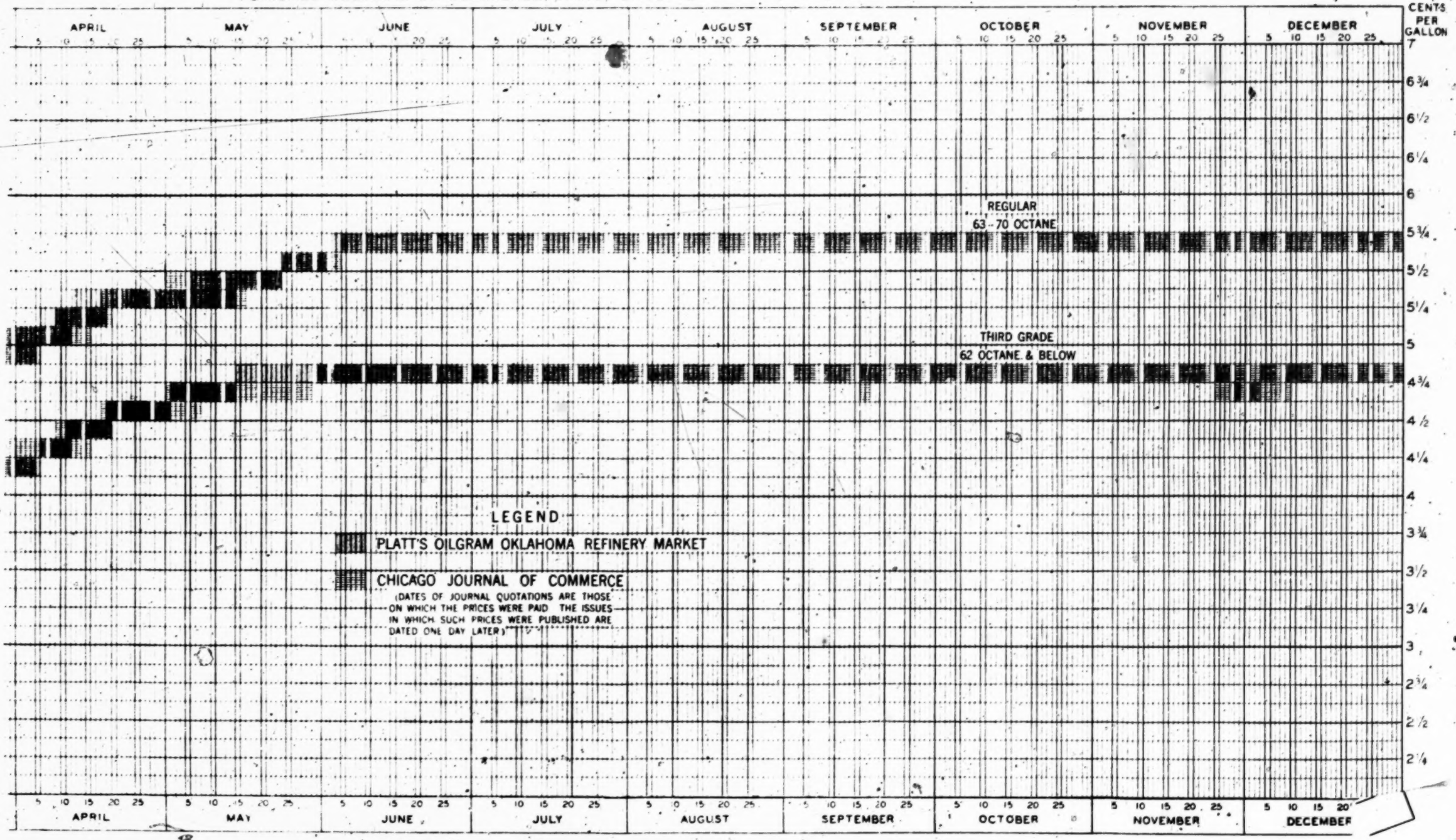
PLATT'S OILGRAM OKLAHOMA REFINERY MARKET AND CHICAGO JOURNAL OF COMMERCE F. O. B. GROUP 3



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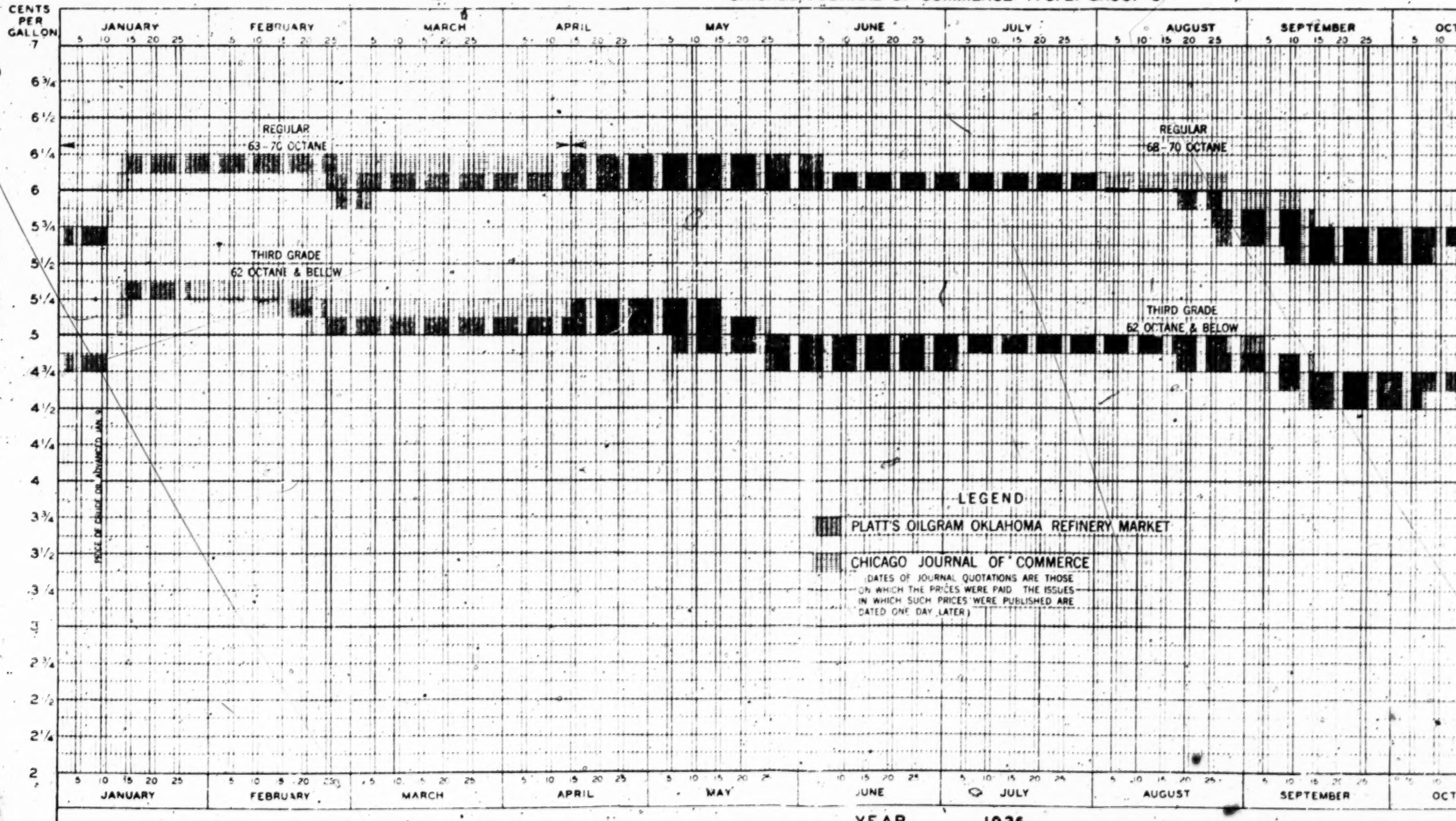

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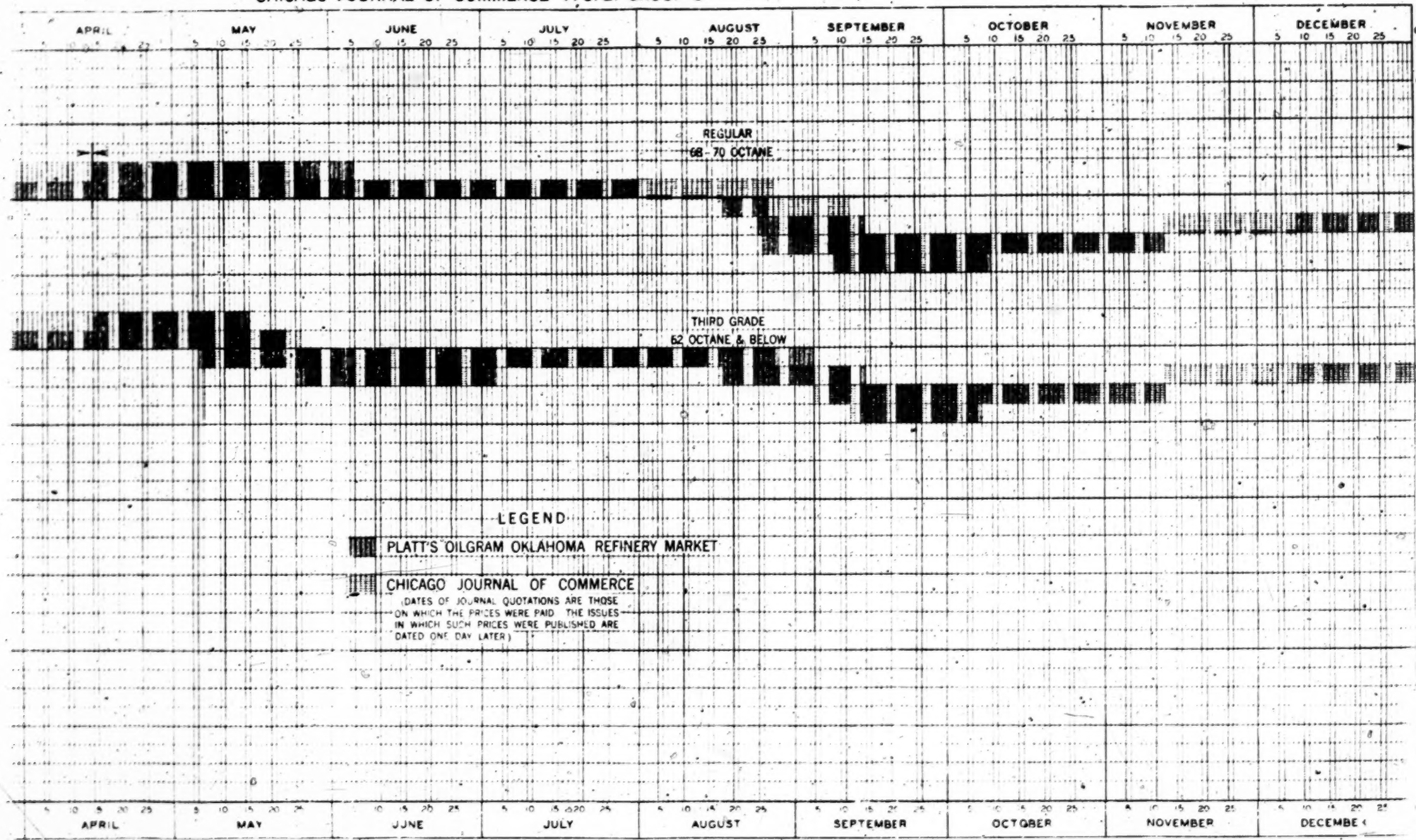

YEAR 1936

It was generally assumed that all companies would come into the picture since a stable retail market requires a higher tank car market."[41]

The effect of the buying program on Mid-Continent spot market prices and prices in the Mid-Western area

The charts opposite this page show the Mid-Continent spot-market prices reported in the trade journals for third-grade gasoline and for regular gasoline, for the years 1935 and 1936."[42]

The chart for the year 1935 shows the manner in which prices advanced in nine successive steps from March 7, when buying began, to the first week in June and thereafter remained stationary, frozen at the level attained. It shows that the low quotation on third-grade gasoline rose from 3½¢ on March 6, 1935, the day before buying began, to 4¾¢ early in June and that dur-

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[41] The following additional portions of the Ruether report are likewise significant:

"*The committee* (except Karstedt) *unanimously agreed that a continuous purchasing program is necessary to take off the market surplus material* from North Texas, Panhandle, Kansas, and Oklahoma. * * *

"It was agreed that the most efficient method to handle the situation, would be for individual major purchasers *to arrange with individual small refiners to keep their surplus off the open markets*—in this manner *the purchases would be effectively placed* and the buyer would be given the opportunity of using his purchasing power to influence the operating program of the small refiners to stay within his allocation etc."

[42] These charts are defendants' exhibits 679 and 680 for identification (R. 3105, 3109). The data shown is identical with that on other charts admitted in evidence (see Ex. 1024, R. 3807). These particular charts are used because the omission therefrom of additional data makes it easier to observe the price trend.

ing the same period the low quotation on regular gasoline advanced from 4⅜¢ to 5⅝¢. This represents a price rise of 35.7% for third-grade gasoline and of 28.6% for regular gasoline.

At the trial of this cause one of the contested issues was whether the defendants' buying program, carried on with the active cooperation of the leading independent refiners, caused the March–June advance in Mid-Continent spot market prices and the subsequent stationary price level thereafter maintained. By the jury's verdict, this issue was decided adversely to respondents.[43] Since there was ample evidence to support the jury's determination, we do not understand that this factual issue is now in dispute.

The Circuit Court of Appeals recognized that the spectacular rise in prices in the first part of 1935 and the unprecedented price rigidity thereafter constituted, on its face, "rather convincing" circumstantial evidence that the defendants had the power to control and did control spot market prices (R. 3933). Moreover, there was other evidence of a convincing character to which the jury was entitled to give weight.

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[43] The district court after outlining to the jury the opposing contentions of the parties as to the factors causing the March-June rise in spot market prices and their subsequent uniform level (R. 2405–6), charged the jury (R. 2407):

"Now, unless you find from the testimony and believe beyond a reasonable doubt that the said price increased, and its continuance at the level shown by the evidence was caused by an unlawful agreement or combination of the defendants, as alleged in the indictment, and as heretofore defined and explained to you, and not caused by the factors aforesaid, then it is your duty to acquit the defendants and to return verdicts of 'not guilty.'"

The buying program removed 20% to 30% of the gasoline which would otherwise be offered for sale on the Mid-Continent spot market and removed from one-third to one-half of the amount which would otherwise be sold on that market by the independent refiners whose offerings were most likely to depress spot market price (*infra*, note 60, pp. 47–48). Such a substantial contraction in supply, particularly when undertaken for the purpose of raising and maintaining prices, could be expected to achieve this result.

Employees of majors, acting as observers of the market and reporting contemporaneously on market conditions, frequently attributed advancing or firm and stable spot market prices to the majors' concerted buying. The fact that trained market observers held these opinions is highly persuasive. Excerpts from typical reports are listed below:[44]

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[44] A report on March 15, 1935 says, after referring to the buying by majors, that "thus far results are gratifying" and that "Since this stabilization work started an advance in price of about ⅜¢ per gallon on both grades has resulted" (Ex. 687, R. 3112). A report early in April states: "The improvement in the market the last few weeks is considered directly due to cooperative efforts of major companies participating in the movement" (Ex. 251, R. 2846). A report later in the month states: "Prices have been boosted by actual purchases through the support of major company cooperation in eliminating surplus gasoline stocks at various small refineries. For this reason, most observers feel the market will continue firm for the next few months if major companies will continue to give active support in absorbing a small percentage of the gasoline production" (Ex. 253, R. 2852). A report near the end of the month states that buying by majors, coupled with the allocation of refinery crude runs "is considered largely responsible for the improvement in the refinery gasoline market the last several weeks" (Ex. 254, R. 2855).

There were similar reports as to East Texas, that is, that firm or rising prices were due to the majors' purchasing program."

As we have previously pointed out (*supra*, pp. 10–11), the price at which majors sold to jobbers in the Mid-Western area automatically advanced, under the provisions of the jobber contracts, with each advance in Mid-Continent spot market prices and, when the level which spot market prices reached in June 1935 was main-

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Reports during the last half of 1935 when spot market prices remained stationary are even more convincing. It was reported that "refiners, through their combined efforts, have prevented any downward trend in the published gasoline quotation list" (Ex. 268, R. 2882); that the market was fairly firm, notwithstanding slow gasoline demand, "primarily as the result of strong inter-refinery buying" (Ex. 218, R. 2819); that the buying by majors "is conceded to be the outstanding feature of support in the prevailing market" (Ex. 277, R. 2909); that this buying was considered "the factor which has so well regulated the balancing of supply and demand for the last few months" (Ex. 273, R. 2897); that unless this buying is continued, "there will result a drastic reduction in spot gasoline quotations" (Ex. 276, R. 2906).

When on only two occasions in 1935 the low quotation on third-grade gasoline dropped temporarily ⅛¢, once in September and once in late November-early December, market observers attributed the prompt restoration of prices to buying support by majors (Exs. 269 (R. 2885), 280 (R. 2918), 281 (R. 2921)).

Again in January 1936 when spot market prices advanced ½¢ in the dead of winter when normal demand is at the lowest, one of the majors' field representatives reported that buying by majors "has been a great help in absorbing gasoline offered, which has prevented any surplus gasoline from hindering the upward price trend of the tank car market" (Ex. 286, R. 2930).

[45] Exs. 217 (R. 2817), 218 (R. 2819), 256 (R. 2858), 275 (R. 2903), 285 (R. 2927–8), 287 (R. 2934). Buckley reported to his company in May 1935 that the purchase of gasoline in East Texas by the majors "was in considerable measure responsible for the difference between the price of 3⅛¢ early in February and the low price of 4½¢ f. o. b. refinery which now prevails" (Ex. 22, R. 2624).

tained, this level fixed the price to jobbers. The same was true in 1936, following the rise in spot market prices in January 1936.

Retail prices in the Mid-Western area similarly kept step with Mid-Continent spot market prices, except that there was a short lag between an advance in spot market prices and the resulting rise in retail prices.[*] This was true as to both normal and subnormal retail prices (R. 1255–7, *supra*, pp. 9–10).

One of respondents' contentions has been that spot market prices were not raised to a level above that which was fair and reasonable. It appears, however, that the raised and maintained price level was such as to yield the majors very substantial profits. On March 27, 1935, the manager of one of the marketing divisions of Socony-Vacuum wrote Arnott that "present prices are just about cost of manufacture" and that if the price of regular gasoline could be raised to 5⅜¢, this would result in "quite a substantial profit for us" (Ex. 306, R. 2957). In fact, the high and low published spot market quotations of regular gasoline, beginning in June and continuing for the rest of the year, were 5⅜¢–5¾¢ (chart, *supra*, p. 29). In January 1936 these quotations advanced ½¢ to 6⅛–6¼¢ (*ib.*). When it is recalled that Socony-Vacuum's sales in the Mid-Western area were over 350,000,000 gallons in 1935 (Ex. 1028, R. 3815), it will be seen that even the minimum ¼¢ advance in price above the "substantial profit" level yielded this one company an additional annual profit of approximately $900,000.

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[*] R. 251, 279, 291, 312, 1236–7. See also *supra*, note 8, p. 9.

Another contention by respondents is that they did not advance spot market prices above a level which would put them in a fair ratio with the price of crude. It appears that as spot market prices advanced and became stabilized at a higher level, the two individuals most actively associated with the buying programs, Jacobi in the Mid-Continent field and Buckley in the East Texas field, reported and predicted that the higher gasoline price level would bring about and would support an advance in crude prices." As we have seen, crude prices did advance in January 1936, and this advance was, in turn, made the basis for an advance in spot market prices by ½¢ a gallon. This illustrates that when interested producers and manufacturers rest the justification for prices which they fix on some assumed ratio or "parity" between raw-material prices and finished-product prices, or vice versa, ratio or "parity" operates in a vicious circle. First, one is made the basis for an advance in the other, and then the latter is made the basis for an advance in the former.

Respondents' attempt to show governmental acquiescence in or approval of their conspiracy

In their briefs in the court below respondents set forth at length evidence upon which they relied to show that certain Government officers encouraged the defendants or acquiesced in the activities for which they were indicted. We shall make only brief reference to this evidence since we believe that the alleged acquiescence or encouragement, if in fact given,

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" Exs. 20 (R. 2623), 73 (R. 2688), 76 (R. 2690).

is too limited in scope to be of any substantial relevance to the issues in this case.

In the first place, the indictment charges and the evidence shows a continuing conspiracy beginning in February 1935 and continuing during 1936. The alleged governmental acquiescence is grounded wholly upon acts or statements by Government officers [46] while they were engaged in administering the code of fair competition for the petroleum industry which the President had approved pursuant to title I of the National Industrial Recovery Act. The authority which these officials could exercise was wholly derived from this code and statute. Such authority terminated when title I of the National Industrial Recovery Act expired by its own terms on June 16, 1935,[47] but the conspiracy admittedly continued unabated after that date.[48] In determining the legality of their subsequent

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[46] These Government officers are Secretary Ickes and individual members of the Petroleum Administrative Board. The code was administered by Secretary Ickes under authority delegated to him by the President and the Secretary in turn appointed a Petroleum Administrative Board to assist him in performing his administrative functions (Ex. 974, R. 3697–8).

[47] Section 2 (c) of the National Industrial Recovery Act of June 16, 1933, provided that title I of the act "shall cease to exist at the expiration of two years after the date of enactment of this Act" (48 Stat. 196).

Even before June 16, 1935, the decision of this Court on May 27, 1935, in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, had had the effect of invalidating all codes approved under title I.

[48] In *United States* v. *Borden Co.*, 60 Sup. Ct. 182, this Court said that the case did not raise the question whether acts or conduct falling within the scope of a license issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act could constitute an indictable offense under the Sherman Act.

restraint of trade it is immaterial whether or not during an earlier period of the conspiracy there was basis for inferring that the conspiracy produced certain effects akin to some objectives sought by Government officers in administering the statute then in effect. Even if there had been express legal authorization of defendants' activities validly granted under the code, this would have had no bearing upon the reasonableness of defendants' restraint of trade during any continuation of the restraint after such authorization had expired.

In the second place the evidence (including that offered but rejected) is inadequate to support even an inference that the conspiracy for which respondents were indicted and tried ever received even the tacit approval of responsible Government officials. There is nothing in the record to show that these officials were ever aware of the real nature of the defendants' activities. Respondents have appeared to rely upon the fact that Arnott in the course of a conference on March 12,

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The Court pointed out that the indictment before the Court charged a conspiracy beginning in January 1935 and continuing to November 1938 and that the defendants operated under a license from the Secretary of Agriculture only in that part of the indictment period prior to March 2, 1935. The Court then said (p. 190): "This clearly imports that the conspiracies were operative after the license came to an end and thus in the absence of any license. A conspiracy thus continued is in effect renewed during each day of its continuance."

1935, with three members of the Petroleum Administrative Board made some kind of verbal report concerning the buying by majors which had been initiated under his auspices a few days earlier (R. 1271–2, 1730).[21] But at this conference Arnott stated that he did not ask for the Board's authorization or "blessing" and that he was acting "on his own responsibility," and the chairman of the Board thereupon advised him that anything which he was doing in the matter was being done wholly "on his own responsibility" (R. 1292–3, 1301–2, 1307).

Reliance has also been placed on evidence purporting to show that Government officials held the view, at certain times and under certain circumstances, that independent refiners suffered from an undue disparity between the price of crude and the spot market price of gasoline and that an increase in spot market prices was the desirable corrective. It does not even tend to show a favorable attitude toward an increase in spot market prices by a combination such as defendants', which vested in majors the power to fix and control spot market prices and jobber and retail prices, or approval of such price-raising and price-maintenance after inter-

[21] There are grounds for doubting the accuracy and completeness of this report (R. 1282–3, 1336–7). Arnott testified that he told the Board "in substance" what he said at the allocators' meeting on March 13, 1935 (R. 1730). As the stenographic report of this meeting shows, he then said with reference to the buying programs that "there are going to be no agreements" and "no group buying" (Ex. 69, R. 2657).

state transportation of "hot" gasoline had been effectively halted.[52]

There was also evidence offered or received that during 1934 the Petroleum Administration approved three programs for the purchase by major companies of gasoline produced by independent refiners. But the evidence relating to earlier buying programs tends to negative rather than to support the view that defendants' buying program would have received, had this been requested, administrative approval. The 1934 programs were approved by formal orders and provided for strict governmental supervision.[53] Secretary Ickes personally suspended the last of them in November 1934, after protest by the Department of Justice, one reason being doubt as to its legality (R. 1743–4, 1799). Arnott's complete skepticism as to the likelihood of being able to obtain such approval as to the buying programs undertaken by the defendants and his

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[52] If at any time there was doubt concerning the attitude of Government officials it should have been dispelled by a letter from Secretary Ickes to Arnott on April 2, 1935, shortly after defendants' combination went into operation (Ex. 980, R. 3722–3). The Secretary there stated that he had received complaints concerning certain other activities of Arnott and called attention to the fact that agreements "which might be in conflict with the antitrust laws" require "specific approval." The letter further stated that when understandings "affecting the industry over a considerable area are intended to operate over a definite period of time or involve substantial changes in the policy of the various supplying companies made only in consideration of similar action on the part of other companies, it is necessary that the procedure required by the Recovery Act be followed in order that the arrangement be legal."

[53] Exhibits 844, 845, 846, 847 for identification (R. 3367–88).

indifference to such approval is shown by the following remarks concerning governmental approval of buying programs made by him at a meeting on March 13, 1935 (Ex. 69, R. 2653, 2657–8):

> Those of us who * * * have had any experience with PAB and eventually the Department of Justice, know just how long that road is, and for some good reason or for some unknown reason or for no reason at all those agreements seem to have disappeared; those outstanding attempts—and they were really sincere and worthy attempts—have disappeared in a sort of cloud of mystery, and I don't think I, for one, or anybody else can tell you just where they have gone—*they are out of our minds, they are completed, they are finished, and we are not interested.*

Respondents' attempt to show that the gasoline of independent refiners which the majors concertedly purchased, and which they designated "surplus" or "distress," constituted a competitive evil

Respondents' principal defense of the reasonableness of their combination is based upon the contention that the gasoline which they combined to purchase was "surplus" or "distress" gasoline, that this gasoline constitutes a competitive evil or a trade abuse, that the primary purpose of their combination was to correct or eliminate this industrial evil, and that any purpose to raise or maintain prices and any increase or maintenance of price actually resulting were merely incidental to this primary objective. Respondents' legal proposition, based on these factual premises, is

that combination or concerted effort, even by a preponderant group in an industry, to remedy an industrial evil, when those combining have neither the power nor the purpose to produce any effect upon market price other than that resulting from correction of this evil, does not unreasonably restrain trade. Respondents thus attempt to bring the facts of this case within the framework of *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344 (R. 2492–7, 3926–30).

The facts bearing upon the foregoing contention deserve careful examination.

The majors agreed to purchase, not the entire output of independent refiners, but that part of the output which they referred to as "surplus" or "distress." These terms were applied interchangeably, but in the contemporaneous documents "surplus" was much more frequently employed.[44] The first thing to be considered is, what are the characteristics which render gasoline "surplus" or "distress"? We find the testimony on this point both vague and conflicting.

One set of witnesses defined "surplus" or "distress" largely in terms of price. Their view was that it was gasoline which could not, or probably could not, be sold except at a price somewhat under the current market, in other words, any gasoline, the sale of which would tend to lower the market price, would be "surplus" or "distress."

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[44] Exs. 177 (R. 2783–4), 376 (R. 2977–8). See also Exs. 253 (R. 2852), 256 (R. 2858), 286 (R. 2930), 293 (R. 2944). The word "homeless" was sometimes used (Ex. 69, R. 2655–6, 2661, 2667).

Defense witness Shatford testified that distress gasoline is gasoline which an independent refiner has on his hands "for which he has no immediate sale except at a price below the current market" (R. 1003). He stated further: "When the market is pretty well saturated with gasoline, it won't absorb the surplus offers, and it is under those circumstances that distress gasoline gives the most trouble" (R. 1004). The witness recognized that under this view "distress" gasoline is not necessarily confined to product in the hands of independent refiners. He testified (R. 1003):

> Distress gasoline also can come from excessive inventories. A little weakness hits the market and the *major companies,* to get rid of the gasoline, dump it just as the small refiner does. Distress gasoline depresses or reduces the general tank car price to the refiners.

Defense witness Frey stated (R. 1327):

> Distress gasoline is gasoline that is forced on the market for one circumstance or another, *usually* at a lower price than that prevailing in the market. It is almost always due to a condition of over-supply, where the refiner is not in a position to finance the holding of that gasoline over a longer period of time.

Two other defense witnesses gave like testimony (R. 671, 929).

Another set of witnesses defined "distress" or "surplus" as being any and all gasoline produced by an independent refiner in excess of the requirements of his regular trade customers. Jacobi, a member of the mechanical subcommittee regulating purchases in the Mid-

Continent field, said that gasoline is distress when independent refiners "haven't got a regular purchaser for it," which "they would have to shop around to get a purchaser for" when they sell it on the spot market (R. 385). Steiger, the market reporter for Platt's Oilgram, testified that gasoline "left over" after an independent's refiner's "contract customers" and "his regular buyers on the open market" had taken their requirements was distress (R. 751–2). Cline, secretary of the association of East Texas independent refiners through which the majors purchased in East Texas, stated: "Surplus gasoline is more gasoline than the refiners have a regular market for" (R. 643). Defense witness McDowell testified (R. 1166):

> Distress gasoline is that part of any company's manufacture that it has no regular sales outlets for, and that it must sell at prices substantially below the market.

McDowell's view that gasoline sold on the spot market to other than the refiner's regular customers would have to be sold at less than the current market price, in other words, that the price would be lower in sales resulting from arms-length transactions than in sales pursuant to a long-standing trade relationship between the parties, rests upon the assumption that price weakness is a normal condition of the spot market, that its permanent condition is that of a buyers', as distinguished from a sellers', market. It may be conceded that this was the condition of the spot market at the time the conspiracy was formed. But the condition was otherwise during the life of the conspiracy, carried on after the depressing influence of cheap "hot" gasoline had

been eliminated as a market factor and when spot market prices were either rising or "firm." As the testimony of Cline clearly shows, under these conditions sales on the spot market to other than regular customers would not move at lower prices, although they had so moved under the very different conditions prevailing prior to the conspiracy. Referring to the gasoline which the majors bought through the association of East Texas refiners, he testified (R. 642–3):

> I don't believe it is true that if the refiner started out to sell that gasoline to jobbers, and not through our Association, he usually would have to take a lower price for it. I believe he might have to take a little lower price if he sold to a broker.
>
> This surplus gasoline did actually move at a lower price before we had our Association; but that was before the Connally Act or any Federal regulation down there, and we had all kinds of prices.

It is not apparent in what respect "surplus" or "distress" gasoline is a competitive evil under any of the definitions given it. If we accept the definition that "surplus" is gasoline which could not be sold on the open spot market without lowering the current price, *respondents' contention amounts to saying that any lowering of price, any drop in the price of the day, is a competitive evil.* It would seem, on the contrary, that if the supply exceeds that which the market will absorb at the day's price, it is both appropriate and necessary that the market price should fall if it is to be a true barometer of market conditions.

Possibly a different conclusion may be warranted when, due to basic industrial changes, there exists as to a particular commodity a relatively permanent condition of oversupply.[55] But it is manifest that in this case no such situation existed. Spot market sales were only 5% to 7½% of total consumption in the marketing area which the spot market primarily served (*supra*, p. 12), so that gasoline offered for sale on the spot market was only a small fraction of the potential demand for these offerings.

Nor can sales on the spot market to other than regular customers be considered a competitive evil. The fallacy of this view is demonstrated when consideration is given to the consequences of its thoroughgoing application. If the only sales on the spot market were sales to regular customers, this would completely exclude from the market all jobbers and brokers accustomed to purchase on a spot basis, not from a particular independent refiner, but from any refiner having supplies on hand. The elimination or sharp curtailment of sales to such purchasers resulting from defendants' conspiracy, far from removing a competitive evil, created one.[56] It might just as well be said that the conspiracy

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[55] See *National Ass'n of Window Glass Mfrs.* v. *United States*, 263 U. S. 403; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, *supra*.

[56] As a result of the buying by majors, brokers and other buyers in the East Texas spot market found it practically impossible to obtain supplies in that market. Exs. 256 (R. 2858), 274 (R. 2900), 275 (R. 2903). See also R. 197-204.

caused distress buying as that it prevented distress selling.

The fact that the limited storage facilities and financial resources of independent refiners made it difficult for them to withhold their product long from the market when the market price was unsatisfactory does not present the situation of the marketing of a by-product under conditions approximating forced sale, such as characterized the "distress" coal discussed in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 362–363, *supra.*[57] The gasoline purchased by the majors (1) was not a by-product the production of which was beyond the refiners' control and (2), since it was the same kind of gasoline as that sold on the spot market, the demand therefor was as broad as the entire market demand.

In the court below, respondents, in an attempt to show that the production of independent refiners approximated the conditions which made coal "distress," asserted that the amount of the independent refiner's production was not within his control and that, having

[57] The conditions which gave rise to distress coal, as described in the opinion of this Court, were: The demand for coal is for particular sizes and in the mining and preparation of any one size, other sizes are made as a by-product. Since there are usually no storage facilities at the mines, the different sizes produced are placed in freight cars. To prevent congestion on the mine tracks, the loaded cars must be shipped to some market. Cars loaded with sizes for which there are no orders on hand are shipped unsold to some consuming center. To prevent heavy demurrage charges, this unsold coal must be sold either during transit or immediately upon arrival.

no storage facilities, his product had to be sold as fast as produced.

We submit that the evidence fails to support these assertions. One witness testified that an independent refiner cannot "close down his plant" without risking loss of his crude oil connections (R. 930), but total stoppage of production is not the same as limiting production and independent refiners were able to and did curtail production.[48]

The testimony as to lack of storage capacity upon which respondents relied was that as a "general rule" independent refiners do not have storage for working stocks "beyond a reasonable limit" (R. 929); that they do not have "any substantial storage capacity" (R. 1010); and that "not very many independent refiners" have the capacity or financial resources to store "large quantities of gasoline" (R. 1166). Other evidence shows that many independent refiners had substantial storage capacity which enabled them to keep gasoline off the market when they regarded this as economically desirable.[49] During the conspiracy period they did not fully utilize their storage capacity. In the

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[48] In October 1935 independent refiners were "following a policy of keeping crude runs down to a level where no burdensome gasoline stocks will accumulate" (Ex. 274, R. 2900), and in December 1935, they had reduced runs 10 to 12% under the preceding month in order to "prevent surplus gasoline from being a burden on the open market" (Ex. 281, R. 2921). Monthly allocations of maximum production by independent refiners were also being made during the conspiracy period by the president of their trade association (*infra*, note 18, p. 82).

[49] R. 1535; Exs. 187 (R. 2754–5), 190 (R. 2764–5), 248 (R. 2840).

fall of 1935 "nonintegrated refiners were operating with the lowest working stocks in history" and "plants which would normally carry an inventory of 10,000 to 15,000 barrels of gasoline reduced stocks to 1,000 and 2,000 barrel levels" (Ex. 30, R. 2631). Substantially the same was true during the following winter (Ex. 76, R. 2690; Ex. 274, R. 2900).

Various additional considerations negative the view that the gasoline which the majors combined to purchase constituted a competitive evil. (1) The amounts to be purchased by the majors were determined by the independent refiners themselves, through Bourque, secretary of their trade association. (2) They were determined (except for isolated amounts) in advance of production (*supra*, p. 17), in other words, before the actual marketing conditions could be known. (3) Finally, and most important, they constituted from one-third to one-half of the normal spot market sales of the Mid-Continent independent refiners named in the indictment and from one-fifth to almost one-third of the normal spot market sales of all the substantial Mid-Continent independents (including those named in the indictment).[80] Such a large percentage of the inde-

[80] Defendants' Exhibit 1023 (R. 3803) shows the total gasoline sales (in gallons) of the Mid-Continent independent refiners named in the indictment and the amount of gasoline (in gallons) purchased from these refiners by the defendants, for the years 1935 and 1936. The exhibit gives the same data for 29 principal Mid-Continent independent refiners (including those named in the indictment). Since independent refiners sell only one-third to one-half of their output on the spot market (R. 189), the

pendent refiners' normal spot market sales cannot, in reason, be categorized as a competitive evil. On the other hand, this contraction in normal spot market supply would directly serve to raise, and to give the defendants control over, spot market prices.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the trial court erroneously charged the jury that if it found that the defendants combined for the purpose of raising and fixing gasoline prices in the manner alleged in the indictment and if it found that they had the power so to raise and control gasoline prices, the restraint of trade was as a matter of law unreasonable and therefore unlawful.

(2) In holding that the decision of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, is inapplicable to the case at bar.

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extent to which defendants' purchases reduced normal spot market supply is shown by the tabulation below.

	Total sales	Normal spot market sales		Purchased by defendants	% of normal spot market sales purchased by defendants	
		½ col. (1)	½ col. (1)		Based on col. (2)	Based on col. (3)
	(1)	(2)	(3)	(4)	(5)	(6)
Independent refiners named in indictment:						
1935	377,998,736	125,999,245	188,994,368	64,440,712	51	34
1936	416,923,200	138,974,400	208,461,600	80,284,988	57	38
20 leading independent refiners:						
1935	903,296,520	301,098,843	451,648,264	98,994,727	31	20
1936	1,004,008,200	334,669,733	502,003,100	109,378,261	32	21

(3) In holding that the trial court failed to submit to the jury the question of the nature and extent of the effect of the combination upon competition on the spot markets and, particularly, upon spot market prices.

(4) In holding that the trial court should have instructed the jury that, even if it found that the defendants in combination had the purpose and power to raise, fix and maintain prices, it might still find the restraint of trade reasonable and, therefore lawful.

(5) In holding that the trial court misdirected the jury.

(6) In holding that the trial court erred in the exclusion of evidence.

(7) In holding that the trial court erred in the manner in which it permitted Government counsel to refresh the recollection of hostile witnesses by the use of transcripts of grand jury proceedings.

(8) In holding that certain remarks of Government counsel in closing arguments were improper and that other remarks, alleged to be improper, were not trivial in their effect.

(9) In reversing the judgments of conviction and remanding for a new trial.

SUMMARY OF ARGUMENT

I

The district court charged the jury that if it found that the defendants had combined together for the purpose of raising and fixing gasoline prices in the manner set forth in the indictment and if it found that they had the power so to raise and fix prices, the restraint imposed by their combination would be unlawful and unreasonable. The district court likewise charged the jury to acquit the defendants unless it found that their combination had such purpose and such power. These instructions were in accord with the rule to which this Court has consistently adhered, namely, that a combination formed for the purpose of controlling the market price of a commodity and possessing the power to make its price control effective gives rise to such imminent danger of, and potentialities for, evil consequences which the Sherman Act was intended to prevent, that it falls within the direct condemnation of the statute and cannot be removed therefrom by an evaluation of collateral considerations urged in justification of the restraint.

We submit that the foregoing rule, crystallized in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, is a sound and correct application of the statutory prohibitions. While the act has been interpreted as forbidding only unreasonable restraints of trade and while this concept is of value in many situations where the nature of the restraint is such that the application of the statute is doubtful, the concept does not compel the conclusion that there are *no* restraints which *ipso facto* come within the condemnation of the act. Indeed,

recognition that there is *some* zone of directly prohibited conduct provides an almost essential starting point in determining the scope of the act's interdictions beyond this zone.

The district court did not err in regarding the present case as within the authority of the *Trenton Potteries* case. Since the price control exercised by the defendants entailed the same consequences as those flowing from an agreement by a dominant group in an industry to sell at uniform minimum prices, the fact that the machinery of price control was different is immaterial. The Sherman Act deals with matters of substance, not the mere form in which the transaction clothes itself.

The Circuit Court of Appeals assumed that the present combination was formed to eliminate a competitive evil and it said that the *Trenton Potteries* case did not bar defense of the reasonableness of the restraint upon this ground. We submit that the court's conclusion is erroneous in both respects. The former is inconsistent with the jury's factual determination and the latter resulted from failure to appreciate that in the *Trenton Potteries* case defense of reasonableness upon the very ground mentioned was presented and rejected.

The court below also said that the kind of price-fixing involved in the *Trenton Potteries* case "in its very nature, destroyed" competition and that under the present combination competition was not destroyed, it was merely affected. This view is based upon the erroneous belief that the present combination destroyed competition only as to the gasoline which the defendants purchased from the independent refiners. The jury's findings, made upon ample evidence, that the defendants

intended to, possessed the power to, and did, raise and fix spot market prices establish that the purpose and effect of the combination was to render the *entire* spot market a rigged, artificial, and noncompetitive market, in which price was not the product of a free play of competitive forces, but was the product of purposeful control, attained through combination. The destruction of competition was therefore as wide and as broad as the market itself.

II

Under the district court's instructions to the jury the question of the reasonableness of the restraint based on collateral questions was withdrawn from the jury. Under these instructions, therefore, evidence relating to defense of reasonableness upon such grounds was immaterial. Since most of the excluded evidence was offered in support of such defenses, the question of error in its exclusion largely turns upon the court's decision as to the validity of the charge to the jury.

Apart from this consideration, if the district court technically erred in any of its rulings on the admissibility of evidence, the error did not affect matters of substance. In a lengthy trial, involving a wide range of inquiry and a great mass of evidence, a new trial will not be ordered on grounds on technical errors in ruling on the admissibility of evidence which do not affect matters of substance.

In addition, respondents failed to show even technical error. The grounds of exclusion involved an exercise of the discretion which, as the court below observed, must be vested in the trial court if the trial

of this kind of a conspiracy is not to "go on forever" (R. 3942). As to the excluded evidence relating to conditions in the petroleum industry, the substance of everything at all material which the defendants offered to prove was established by other evidence and the excluded evidence was merely cumulative. The excluded evidence relating to encouragement of or acquiescence in defendants' activities by Government officers was indirect, remote, and circumstantial and it concerned a largely irrelevant issue. The excluded evidence offered to show that gasoline prices during the conspiracy period were not artificially high or noncompetitive was only remotely related to the real issues in the case and its admission would have raised collateral factual issues tending to confuse the jury and unduly prolong the trial.

III

All of the Government's important witnesses were closely allied with the corporate defendants and were evasive and hostile. In the case of some of these witnesses, the Government attempted to stimulate memory by reference to the witness' prior grand jury testimony. The method used was for the trial court or Government counsel to read to the witness in open court excerpts from such prior testimony. Over 84 percent of the attempts thus to refresh recollection failed and no affirmative testimony of any importance was elicited in this way.

Refusal to allow defense counsel to inspect the grand jury transcript was not reversible error. Where a document is used on the witness stand to refresh recol-

lection, opposing counsel are usually granted, upon proper demand, the right to inspect. Inspection is allowed in order (1) to guard against improper communication to the witness by his own counsel and (2) to afford opportunity to test by cross-examination whether the testimony given was the result of bona fide refreshment. Neither of these reasons apply under the circumstances of this case. The grand jury transcript was read to the witness, not handed to him on the witness stand, and there could therefore be no improper communication. Since no testimony of substance was inspired by this means, cross-examination to test the bona fide character of the stimulation was unnecessary. Since the reasons for permitting inspection di[illegible]not apply, denial thereof was not prejudicial. Nor can prejudice be predicated on comments made by Government counsel in laying the foundation for refreshment. In only three of the ten instances referred to in the opinion of the court below was there objection by defense counsel. Remarks which did not at the time provoke objection are most unlikely to have prejudicially affected the jury.

The right of inspection is limited to such portion of the document as related to the subject matter of the attempted refreshment. Since the inspection demanded by the defendants was the entire transcript of the witness' grand jury testimony, their claim was not support by proper specific demand.

Attempted refreshment by reading from a transcript not authenticated was not error. Authentication is required where the document itself becomes affirmative

evidence in the case, e. g., when it is used for impeachment purposes and when, all present recollection failing, the document becomes a substitute therefor, under the doctrine of past recollection recorded. But when a document is used for purposes of refreshment only, the *testimony of the witness* is the sole evidence received. Nor can it be said that in this case the jury was likely to believe mistakenly that the prior grand jury testimony was itself evidence. The trial court duly warned the jury to ignore the grand jury testimony and it exercised close supervision over the manner in which this testimony was used.

It is immaterial that the grand jury testimony was not strictly contemporaneous with the events to which it related. Contemporaneousness, as an assurance of accuracy, is important only where the prior testimonial statements are themselves received as evidence. Contemporaneousness, being a matter of degree, should be left to the discretion of the trial court. Here there was certainly no abuse of discretion. The prior statements related to a conspiracy continuing at the time the statements were made and related to matters arising in the course of the witnesses' regular business duties and employment.

IV

Respondents contend that certain remarks by Government counsel had the effect of denying them a fair trial. The Government's opening statements and closing arguments, from which the remarks in question are taken, occupy 240 pages of the printed record. The culling from argument of great length of the remarks

most likely to appear objectionable and the assemblage of these remarks, isolated from their context, give a totally misleading impression of the effect produced upon the jury by the argument as a whole. Clearly there was not here that "pronounced and persistent" misconduct of counsel which, at least if the evidence against the defendant was weak, will be assumed to have prejudiced the cause of the accused.

Furthermore, substantially all of the remarks now alleged to be prejudicial either were not objected to at the time they were made or corrective action was taken by the trial court. Objection in the trial court, in order that any necessary correction may be made before opportunity therefor has passed, is not a merely technical requirement but is imposed in the interest of the orderly conduct of litigation. As to the remarks which, upon objection, were withdrawn and which the jury was instructed to ignore, the error, if any, is deemed cured by such corrective action.

V

The district court had jurisdiction to try the offense of which respondents were convicted. It is undisputed that during the conspiracy period the defendants were selling gasoline in the trial district at prices directly based upon Mid-Continent spot market prices. Sales therein at such prices were within the direct purposes and objectives of the conspiracy. The indictment so alleged and the jury, under the district court's instructions, necessarily so determined when it returned verdicts of guilty.

When producers agree to sell their product at uniform minimum prices, their sales are acts in furtherance of the conspiracy and give the court in a district where sales are made, jurisdiction to try the offense. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 403–404, *supra*. In the present conspiracy by the defendants to sell their gasoline in the Mid-Western area (including the trial district) at raised and maintained prices based upon artificially raised and maintained spot market prices, the defendants' sales in the trial district at the artificially raised and maintained prices are likewise acts in furtherance of this conspiracy and gave the court there jurisdiction to try the offense.

It is immaterial that the defendants, prior to the conspiracy, sold in the Mid-Western area on the basis of Mid-Continent spot market prices. Adherence to and continuance of sales therein on this price basis were implicit in their agreement to raise and maintain market price. Furthermore, irrespective of whether or not this was a matter of *express* agreement, sales in the Mid-Western area (including the trial district) at the artificial price level brought about and maintained by the conspiracy supplied part of the "continuous cooperation" necessary to keep the conspiracy alive and to render it effective, and therefore constituted a carrying out of the conspiracy within the trial district.

VI

The charge of the indictment against respondents is separate from, and independent of, the charge against the trade journal defendants, that they guiltily participated therein by publishing false spot market prices. This charge constitutes only a subordinate means for the

effectuation of the conspiracy and is a nonessential allegation since several other means were alleged and proved.

Paragraphs 5–17 of the indictment set forth facts showing that wholesale and retail prices in the Mid-Western area are directly controlled by spot market prices. Paragraph 18 charged a conspiracy to raise and fix prices in the Mid-Western area by raising and fixing prices on the spot market. Since a conspiracy of this kind is unlawful, further allegations of the means by which this objective was achieved are unnecessary.

The program for concerted buying by majors of gasoline of independent refiners is the principal means for effectuating the conspiracy set forth in the indictment. The allegation that the journals, instead of publishing the prices paid in spot sales by independent refiners to jobbers, published the prices which the majors paid them in purchases made under this program, was the allegation of an additional means not in any way essential to the carrying out of the conspiracy described in the indictment.

There was no material variance between the indictment and the proof. The indictment charged, and the proof showed, a combination falling within the rationale of the decision of this Court in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, *supra*. Moreover, the variance, if any, between the indictment and the proof was in no way prejudicial to the respondents.

VII

In the court below respondents did not attempt to show that the evidence was insufficient to support the

jury's findings that they had combined for the purpose of raising and fixing prices and that they had the power, in combination, to achieve this end. Respondents merely detailed certain evidence which, if the jury had given it controlling weight, would have supported certain contrary findings. Since it lies with the jury, not the court, to pass upon conflicting evidence and disputed factual issues, respondents wholly failed to make out a proper case for granting their motions for directed verdicts.

VIII

The district court's award of a new trial to another corporate defendant, Standard of Indiana, did not have the effect of retroactively invalidating the jury's verdict against respondents. The district court denied Standard of Indiana's motion for a directed verdict. Its motion for a new trial was granted upon the ground that there was "good reason to believe" that it had not had "an adequate separate consideration" of its defense. These rulings constituted an adjudication that the evidence was sufficient to warrant the jury in finding that Standard of Indiana was a party to the conspiracy. It follows, therefore, that when the jury, in passing upon the question of the power of the defendants to raise and fix prices, did so in the light of Standard of Indiana being a party to the conspiracy, the jury's determination of the issue of power was made on the basis of adequate and sufficient evidence as to all matters involved in its determination of this issue and the jury's determination was not only free from fundamental error, it was free from error of any kind.

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The ground upon which Standard of Indiana was granted a new trial would seem to be a doubtful one and it was certainly one which involved exercise of the discretion vested in trial courts in passing upon motions for new trial. Since respondents' claim to a new trial rests on the fact that the district court determined that Standard of Indiana was entitled to a new trial and since this was a purely discretionary ruling, respondents' claim to a new trial, which cannot be superior to the claim on which it rests, must likewise lie within the realm of discretion. Nothing is better settled than that the exercise of the trial court's discretion in passing upon a motion for new trial will not be reviewed by an appellate court unless the trial court erroneously concluded that it did not have jurisdiction of the motion or of the grounds advanced in support thereof. The facts of this case establish that the district court had no doubt as to its jurisdiction to pass upon respondents' motions for new trial, including all grounds advanced in support of these motions. In addition, the burden rests upon respondents to show that the district court failed to take jurisdiction.

There is a further obstacle to the relief sought by respondents. They did not present to the district court the ground upon which they now urge that they are entitled to new trials, namely, that the granting of a new trial to an important corporate defendant would require the granting of the same relief to all the other defendants. Their failure to present this question to the trial court bars them from obtaining review thereof by an appellate court.

ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY THAT IF THE JURY FOUND THAT THE DEFENDANTS HAD COMBINED FOR THE PURPOSE OF RAISING AND FIXING GASOLINE PRICES IN THE MANNER ALLEGED IN THE INDICTMENT AND IF IT FOUND THAT THEY HAD THE POWER SO TO RAISE AND FIX PRICES, THE RESTRAINT IMPOSED BY THEIR COMBINATION WAS UNREASONABLE AND UNLAWFUL

The most important issue in this case is whether the district court was correct in charging the jury that, if the defendants combined together for the purpose of raising and fixing gasoline prices in the manner charged in the indictment and if they had the power to raise these prices, their restraint was unlawful and unreasonable. Determination of this issue turns upon whether the case at bar is within the authority of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, where it was held that a price-fixing combination which vests in the parties thereto the power to control the market and to fix arbitrary and unreasonable prices constitutes an unreasonable restraint within the direct prohibitions of the Sherman Act, and that therefore, if the jury finds that a combination having such power and purpose has been formed, no question as to the reasonableness of the restraint is open, by way of defense, for jury consideration.

In dealing with the above issue, we shall set forth (1) the nature of the instructions given the jury in this case; (2) the tests or criteria applied in determin-

ing the reasonableness or unreasonableness (i. e., legality or illegality) of various types of restraint of trade, particularly those involving price fixing or price control; (3) the considerations which support the soundness of the holding in the *Trenton Potteries* case; and (4) the reasons which compel the conclusion that in the instant case this holding was correctly applied in the district court's instructions to the jury.

A. *The jury was instructed to acquit the defendants unless it found (a) that they had combined for the purpose of raising and fixing spot market prices and for the purpose of thereby raising and controlling the prices of the gasoline sold by them in the Mid-Western area and (b) that they had, in fact, raised and fixed spot market prices; and the jury was further instructed that if it found both that the defendants had combined for these purposes and that they had the power so to raise and control gasoline prices, the restraint imposed by their combination would be unreasonable and unlawful*

The district court's charge is clear as to the minimum findings which the jury was required to make before it could find the defendants guilty. The jury was instructed that before returning a verdict of guilt against any defendant it must find that the evidence established beyond a reasonable doubt all the material and essential allegations of the indictment, as these had been stated and described in the court's charge (R. 2400–1).

Under this instruction and under the court's statement of the material and essential allegations, the jury, in order to return a verdict of guilt, was required to find

that the defendants had combined together "for the purpose of raising and fixing" gasoline prices in the Mid-Western area; that prices in this area were "determined by the prices paid for gasoline in certain spot markets"; that "in order to raise"[1] the price at which they sold gasoline, both at wholesale and at retail, in the Mid-Western area, "the defendants combined together, and also combined with a large number of so-called independent refiners, to raise the spot market prices"; that the defendants organized two buying programs "in order to raise the spot market prices, and thereby to raise the prices of gasoline sold by the defendants" in the Mid-Western area (R. 2399–2400).

Near the end of the charge the jury was again instructed that it could not find the defendants guilty unless all the material and essential allegations of the indictment were proved beyond a reasonable doubt (R. 2417). The court amplified this instruction by stating

[1] In the charge the terms "raise" and "fix" are usually employed together. The term "raise," when used alone in some places in the charge, must have the same connotation as, and must have been understood by the jury in the sense of, "fix." It is clear law that the language of a charge is to be interpreted in the light of the evidence and the issues before the jury to which it relates. *Southern Pac. Co.* v. *Hall*, 100 Fed. 760, 769 (C. C. A. 9th); *Hall* v. *McKinnon*, 193 Fed. 572, 576 (C. C. A. 9th); *Seaboard Airline Ry.* v. *Padgett*, 236 U. S. 668, 672. Here the indictment and the uncontradicted evidence show that the spot market prices had been "raised" by some force, not raised generally, but raised from a low, fluctuating level to a definitely fixed, uniform level and had been held there by some control. This kind of raising is fixing. It was therefore left to the jury to determine whether defendants' combination, or some other forces, caused not a general raising in prices, but this particular kind of price-raising and price-control.

that all the defendants should be acquitted unless the jury found beyond a reasonable doubt that the defendants had conspired together "for the purpose of artificially raising and fixing" spot market prices and that they had also "intentionally raised and fixed the tank car price of gasoline" in the Mid-Western area and had "intentionally raised the general level of retail prices prevailing in" this area (*ib.*). The jury was cautioned that a showing that prices in the Mid-Western area had increased was not sufficient to sustain these allegations, but that the jury must find beyond a reasonable doubt that the defendants had combined together "for the purpose of increasing and fixing the same as well as for the purpose of raising and fixing" spot market prices (*ib.*).

The jury was also instructed to return verdicts of "not guilty" unless it found beyond a reasonable doubt that the March–June 1935 rise in spot market prices and their uniform level during the remainder of the year "was caused by" an unlawful combination of the defendants such as alleged in the indictment and explained in the court's instructions, "and not caused by" the factors to which the defense evidence attributed this rise in price and subsequent stationary price (R. 2407).

The jury was advised that it must consider all the facts and circumstances and evidence in determining both whether the combination charged in the indictment had been formed and whether its purpose was that of "unlawfully raising and fixing" gasoline prices in the Mid-Western area (R. 2408, 2409).

The jury was *not* instructed that it should convict the defendants if it found that the essential allegations of the indictment had been proved beyond reasonable doubt. It *was* instructed that the Sherman Act does not prohibit joint action for a lawful purpose and that the Act does not render all cooperative or concerted activity illegal (R. 2402). The court's instruction was that the Act makes it unlawful for a group of individuals or corporations to conspire to raise the price of a commodity when the combining parties "control a substantial part of the interstate trade and commerce of that commodity" (R. 2404–5). This general instruction was then applied to the facts of the instant case as follows (R. 2405):

> If you find that the defendants, and those acting in concert with them, controlled the greater part of the gasoline sold in the ten Middle Western States, *and had the power to raise the price of that gasoline,* and that the defendants and these other persons acting with them have knowingly engaged in a combination to raise or fix the price to be charged for gasoline to jobbers or consumers in the Mid-Western area as charged in the indictment, then you will understand that these defendants have violated the Sherman Act and are guilty as charged in the indictment.

The court charged the jury that if it found such a combination—that is, one having both the purpose and the power so to raise prices—then the combination

would be illegal regardless of any good intentions of the defendants or whether prices fixed were reasonable or unreasonable, or whether or not the conspiracy was beneficial to independent refiners (R. 2405, 2407). The substance of the charge, that if there was both the power and the purpose so to raise prices the restraint would be unlawful irrespective of any other considerations, was several times repeated.[2]

Respondents have contended that at one point in its charge the district court laid down a more restricted rule, which was confusing and erroneous. This contention is based upon the italicized words in the following sentence in the charge (R. 2414):

> If you should find that the defendants acting together, and those independent refiners found acting in concert with them, did not have the power to raise the level of spot market prices in the spot markets referred to in the indictment, or that they did not combine for that purpose, *and if you should find also that the purchase of the said gasoline by the defendants affected the spot market prices only indirectly and incidentally,* then you may consider all the circumstances surrounding the activities of the defendants to determine whether they were intended to and did merely eliminate abuses which tended to produce destructive competition and restore

[2] End of last paragraph R. 2407; first paragraph R. 2408; first full paragraph R. 2409; second paragraph R. 2414; first full paragraph R. 2415.

competition to a fairer basis and produce fairer price levels.

In view of the court's explicit instructions that the defendants were to be *acquitted* unless the jury found that they had combined for the purpose of raising and fixing both spot market prices and prices in the Mid-Western area (*supra*, pp. 63–64), and its explicit instructions that the defendants should be *acquitted* unless the jury found that defendants' combination had, in fact, caused the rise in spot market prices in the early months of the conspiracy and the fixed price level thereafter maintained (*supra*, p. 64) and its instructions that it was *the purpose to raise prices by the means set forth in the indictment, in conjunction with the power to raise prices*, which would make the restraint unlawful under the statute irrespective of any collateral considerations bearing on the question of reasonableness, the jury could not have been misled by any error lurking in a subsidiary part of one sentence in an extended charge.[3] The best evidence that the jury was not misled is the fact that none of the numerous defense counsel took an exception specifying the error which respondents now assert, namely, that the jury was not permitted to consider the reasonableness of the restraint unless it first found that the defendants' purchases affected spot market prices only indirectly and

[3] The charge, as printed in the present record, covers 26 pages (R. 2396–2422).

incidentally.[4] In fact, the exceptions which were taken indicate that defense counsel understood that the charge as a whole did not have this meaning.[4]

Respondents' failure to take any exception specifying the error now alleged bars them from raising it in their appeal. The rule is "that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein." *Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114, 122. See also *Burns* v. *United States*, 274 U. S. 328, 336; *Thiede* v. *Utah Territory*, 159 U. S. 510, 521–522. As these authorities show, the rule is not merely technical, but serves the important purpose of calling attention to the precise error complained of, so that the trial court will be afforded opportunity to correct its charge.

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[4] The exceptions to the charge were general. Exception was taken to so much of the charge "as stated that any agreement between persons having for its purpose the raising of prices as distinguished from the fixing of prices was itself unreasonable under the Sherman Act irrespective of other circumstances" (R. 2424); to the court's failure "to define to the jury what constitutes lawful and unlawful restraint, and to state to the jury what circumstances they should take into account in determining whether or not a given restraint is reasonable or unreasonable" (R. 2425); to "the Court's charge that a combination to raise a price where there is power to control such price is in itself unlawful and unreasonable even though that power * * * is merely power to remove an obstacle to a healthy, competitive price, and to remove a destructive practice in the industry" (R. 2430).

B. *This Court has uniformly held that a combination having both the purpose and the power to control the market price of a commodity imposes an unreasonable and unlawful restraint, directly prohibited by the Sherman Act*

The section of the Sherman Act which is here involved prohibits contracts, combinations, and conspiracies "in restraint of" interstate and foreign commerce. The act contains no further specification of the conduct thus proscribed, but the rule of interpretation laid down in *Standard Oil Co.* v. *United States*, 221 U. S. 1, is that only restraints which are unreasonable are forbidden. Trade, however, may be restrained in many different ways and there is no one rule or test of general application for determining what restraints are unreasonable. The criteria of unreasonable restraint therefore vary with the type of restraint involved. We are here concerned with the scope of the act's prohibitions as to a particular type of restraint, but brief consideration of the basis of decision respecting other forms of restraint will serve to show that in these other restraints, just as in the one now under consideration, the criteria applied in determining whether the restraint is unreasonable are comparatively definite and limited. While a wide scope of factual inquiry is frequently necessary or appropriate when a combination is charged as being in illegal restraint of trade, this is so, not because each individual case calls for its own individual criteria of illegality, but because the *facts* relevant to determining the presence or absence of the con-

trolling criteria of illegality vary from case to case and, in addition, usually are complex.

When a combination takes the form of a union of ownership of competing concerns, the emphasis is on the purpose and the power to exclude competitors from the field and to attain monopolistic or semi-monopolistic control.[5] When those engaged in performing the same function or service take concerted action directed against concerns performing a different function or service, for the purpose of furthering the interests of the first group at the expense of the latter, the emphasis is on the restraint of, or interference with, the right freely to engage in interstate trade.[6] The same element is uppermost where there is a combination not to deal with or not to buy from a particular concern, with the purpose and effect of injuring its interstate trade.[7]

Where competitors, without any integration of property or ownership, combine to limit competition among themselves, the element which is uppermost is the injury to the general public which results from depriving it of benefits which a competitive regime is believed to promote.[8] If there is a combination to exchange statistical information and the only competition eliminated is that

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[5] *Standard Oil Co.* v. *United States*, 221 U. S. 1, 57–58, 75–77, *supra*; *United States* v. *Reading Co.*, 253 U. S. 26, 57–59.

[6] *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 611–612, 614 (retailers against wholesalers); *United States* v. *First National Pictures, Inc.*, 282 U. S. 44, 54 (motion picture producers and distributors against exhibitors).

[7] *Loewe* v. *Lawlor*, 208 U. S. 274, 292–294; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 312.

[8] *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 388–390.

which would flourish in the absence of such exchange of information, the restraint is reasonable.[9] The same is true if the elimination of competition is really a defensive measure directed at unfair or improper trade practices.[10] But when a combination having such objectives goes further and employs them primarily as a medium for raising prices, limiting production, or cutting off opportunities for variation in the course of competition, the restraint becomes unreasonable and unlawful.[11] *A fortiori,* when a combination is formed for the purpose of controlling the price of a product and it has the power to make its price control effective, the character of the restraint is unlawful and within the direct condemnation of the statute and it cannot be removed therefrom by virtue of any alleged offsetting business or economic considerations.

This Court has consistently adhered to this last proposition.[12] *United States* v. *Trans-Missouri Freight*

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[9] *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563, 582–585; *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588, 605–606.

[10] *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588, 602–604; *supra; Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, *supra.*

[11] *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 411–412; *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 389–390, *supra; Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 599–601, *supra.*

[12] *Chicago Board of Trade* v. *United States*, 246 U. S. 231, although sometimes cited as an exception, is not. A rule of the Board (a grain exchange) prohibited members from purchasing certain grain between the close of the exchange on one day and its opening the next business day, other than at the closing bid on the exchange. The rule did not, either in purpose or effect, involve price control and it was held not to constitute an unrea-

Ass'n, 166 U. S. 290, 330–331, 342, and *United States* v. *Joint Traffic Ass'n,* 171 U. S. 505, 565, 577, held that agreement by competing railroads on uniform freight rates violates the act and that it is no defense either that the rates fixed are reasonable or that the agreement was formed to put an end to destructive competition. In *Standard Oil Co.* v. *United States,* 221 U. S. 1, 64–65, *supra,* the Court said that these decisions were not in conflict with the interpretation of the statute which it was then adopting, that it prohibits only unreasonable restraints. The Court said that in the freight association cases the conduct complained of "operated to produce the injuries which the statute forbade" and that "resort to reason was not permissible in order to allow that to be done which the statute prohibited." It also said that the agreements in those cases, considering their necessary effect, "were clearly restraints of trade within the purview of the statute," and "could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts."

Addyston Pipe and Steel Co. v. *United States,* 175 U. S. 211, involved an agreement for collusive bidding, entered into by manufacturers of cast-iron pipe whose mills were located in a certain geographical area. Less than half the productive capacity of the country was represented in the combination, but adverse freight rates made the competition of non-members' mills only

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sonable restraint of trade. As the Court pointed out (pp. 240–241), its purpose was to concentrate trading on the exchange, where prices were determined competitively and openly, and it "had no appreciable effect on general market prices."

partially effective. This Court, in holding the agreement unlawful under the Sherman Act, quoted with approval (pp. 235, 237–238) a portion of the opinion of the Circuit Court of Appeals which declared that the reasonableness of the prices actually charged was no defense to a combination of this kind.

In *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, *supra*, the defendants, manufacturers of 82% of the sanitary pottery produced in the United States, were convicted under an indictment charging that they had combined to fix and maintain uniform prices for the sale of their product. The trial court charged the jury—

> * * * an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; * * *.

The court also charged the jury that if it found such an agreement it might return a verdict of guilty without regard to the reasonableness of the prices fixed, or the good intentions of the combining parties or whether prices were actually lowered or raised.

This Court held that the trial court "correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged." In stating the grounds for this conclusion, the Court said (p. 397):

> Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the domi-

> nant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. * * * it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. [Citing cases.]
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> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. * * * Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, * * *.

The Court also said (p. 398):

> Thus viewed, the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It "is a limitation of rights, * * * which may be pushed to evil consequences and therefore restrained."

In *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, *supra*, the Court did not in any way depart from this holding. The *Appalachian Coals* case sustained the legality of a plan whereby certain producers of bituminous coal, having 64% of the production in the area in which their mines were located and 12% of the production east of the Mississippi River agreed to sell their coal through a common selling agent. This Court said (p. 373): "The plan cannot be said either to contemplate or involve the fixing of market prices." It said (*ib.*) that the evidence as to the conditions of the

production and distribution of bituminous coal and the extent of developed and undeveloped mining capacity, "makes it impossible to conclude that defendants through the operation of their plan will be able to fix the price of coal in the consuming markets." Again the Court said (p. 375), "there is, as we have seen, no intent or power to fix prices."

The "deplorable" conditions in the bituminous coal industry, resulting from a progressively diminishing market for its product and aggravated by certain "destructive" marketing practices which the plan sought to remedy or mitigate, were found to be the occasion for and the real objective of the agreement (pp. 361–367, 372). The ultimate holding (pp. 373–377) was that an agreement lacking power or purpose to fix market prices, and really designed to remedy trade abuses, cannot be said to restrain trade unreasonably *merely because* it has "a tendency to stabilize market prices and to raise them to a higher level than would otherwise obtain" or because it eliminates price competition among the parties to the agreement.[13]

The limitations of the foregoing decision are clearly marked in *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, *supra*. The Court recognized that the trade association of sugar refiners had been formed for the primary purpose of putting an end to the granting of secret, discriminatory price concessions to individual

[13] The Court nevertheless recognized (pp. 377–378) that since the case had been tried before the agreement had been put into effect, it might prove in actual operation to be an undue restraint upon interstate commerce. It therefore directed the district court to dismiss the bill of complaint without prejudice and with the provision that the court might set aside its decree and take further proceedings if future developments should justify this course.

customers and that this practice, prevalent in the industry, constituted a trade abuse. But since the Court also found that the carrying out of this undertaking had resulted in an undue restriction of competition among the refiners (who supplied from 70% to 80% of the total sugar consumption), unreasonable restraints were imposed. The Court said (p. 599):

> As the statute draws the line at unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them.

C. *The holding in United States* v. *Trenton Potteries Co., 273 U. S. 392, that a combination having both the purpose and the power to control the market price of a commodity is unlawful under the Sherman Act, is a sound and correct application of the prohibitions of the Act*

The basis of decision in the *Trenton Potteries* case is, as we understand it, that when competitors having the power, through limitation of competition, to control the market price of a commodity enter into an agreement the major purpose of which is to exercise such price control, the restraint imposed is so directly productive of "evil consequences" which the act was intended to prevent that the statute renders the restraint unlawful under any and all circumstances. Accordingly, when court or jury has determined from all of the evidence that such an agreement exists, this determination renders court or jury *functus officio* respecting the reasonableness of the restraint. The soundness of this application of the statute is, we submit, beyond question.

The opposing view is that such a restraint is open to defenses involving, not the nature of the restraint itself,

but an attempted evaluation of either collateral and subordinate objectives of those combining or the reasonableness of the prices actually imposed. This view would strip the statute of all certainty as to content.

The word "unreasonable" is not to be found within the statute. Granted the value of this concept as an aid in many situations where the nature of the restraint is such that the application thereto of the statutory prohibition is doubtful, there is nevertheless far less justification for assuming that there can be *no* restraint *ipso facto* within the condemnation of the statute than for assuming that *every* restraint of trade, whatever its nature, is condemned. Unless the tests which the courts apply in defining the scope of the act's interdictions are to be almost wholly subjective, it must be assumed that the interdictions of the act have some definable starting point, that there is *some* zone of directly prohibited conduct.

In the *Trenton Potteries* case the Court said that the restraint there involved was of itself unlawful. A somewhat different way of stating what was actually held may serve to show that the case is but an application of principles generally applied in determining what restraints are prohibited by the Sherman Act.

Whether certain conduct does or does not constitute an unreasonable restraint of trade is a question of law for the courts to decide in the light of all the facts relevant to this question.[14] In a criminal proceeding such

[14] Under the Federal Trade Commission Act the Commission is the sole fact-determining body, but what constitutes the "unfair methods of competition" which that act prohibits is a matter of law for the courts to decide. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427; *Raladam Co.* v. *Federal Trade Commission*, 283 U. S. 643, 648.

as the *Trenton Potteries* case and the instant case, when any relevant facts are in dispute it is for the jury to decide these factual issues, but what are the factual findings which, if made, will establish the guilt of the defendants is a question of law for the trial court to decide.

The holding in the *Trenton Potteries* case, that if certain basic facts are found to exist the restraint is unlawful, irrespective of what conclusion might be reached upon other factual issues raised by the defense, is essentially the process of decision in equity cases. Most of the cases under the Sherman Act which have come before this Court have been proceedings in equity and in these cases the distinction between questions of law and questions of fact is obscured, but the process of decision, nevertheless, involves singling out the facts relevant to the legality of the restraint, deciding what these facts are, and then determining the legal conclusion flowing therefrom. Thus, in *Eastern States Lumber Ass'n* v. *United States*, 234 U. S. 600, 613, *supra*, an equity proceeding, the Court, having first found that the systematic circulation among a large group of retailers of a list of wholesalers who sold at retail had and was intended to have the effect of causing such retailers to withhold their patronage from the concerns listed, concluded that these facts made the restraint unlawful irrespective of whether or not the defendant's course of action was "necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities."

If the case at bar were a suit in equity and this Court had made the findings which the jury necessarily made

when it returned a verdict of guilty—that the defendants combined for the purpose of raising and fixing the market price of gasoline and that they had the power to exercise and had actually exercised this control over market price—there would seem to be no doubt that the restraint of trade would be held unreasonable and unlawful irrespective of the Court's findings on any of the collateral issues tendered by way of defense.[15] As we have seen (*supra,* pp. 75–76), in the *Sugar Institute* case the restraint involved—cutting off "opportunities for variation in the course of competition however fair and appropriate they might be" [16]—was less objectionable than the one involved here, yet this Court rejected as a defense of the reasonableness of the restraint a more meritorious defense—preventing a genuine trade abuse—than the vague and uncertain grounds of defense here. Since, therefore, if the case at bar were an equity proceeding, the Court, in the process of reaching decision, would lay aside these collateral grounds of defense, the trial court was clearly correct in pursuing a like course of action in its instructions to the jury.

D. *The holding in the Trenton Potteries case and other like cases was correctly applied by the trial court in its instructions to the jury in the case at bar*

Respondents have sought to distinguish the case at bar from the *Trenton Potteries* case on a number of dif-

[15] E. g., that a subsidiary purpose was to aid independent refiners in obtaining fairer prices for their product or that, when the conspiracy was formed, the defendants reasonably believed that certain Government officers favored higher spot market prices than those then prevailing.

[16] 297 U. S. 553, 601.

ferent grounds. One ground (not very seriously pressed) is that the reasonableness of the prices fixed or exacted is the only defense barred by that decision. While the opinion primarily deals with the question whether this defense (the one most clearly pertinent and persuasive) is open, it is clear that the actual holding, as well as the language of the Court, forecloses defense of reasonableness upon any other ground.[17]

Another contention of respondents is that the authority of the *Trenton Potteries* case is to be confined to combinations where the machinery of price control is the same as in that case, namely, an agreement upon uniform minimum selling prices. This attempted limitation of the decision ignores that aspect of the restraint which led to its condemnation—the attainment, through combination and elimination of competition, of "power to control the market and to fix arbitrary and unreasonable prices."

In the instant case the machinery of price control was more complex, but entailed the same consequences as, an agreement by a dominant group in an industry to sell at uniform minimum prices. The first step was raising and controlling spot market prices by means of a buying program which (1) sharply curtailed market supply and (2) absorbed any part of the supply which the independent refiners might be unable to sell at the going market price. This program, with the sellers and the buying group both desiring the same end, higher prices, gave such control over market price that prices

[17] See our previous statement of the *Trenton Potteries* case (*supra*, pp. 73–74).

could be driven upward until the desired level had been reached and could then be held at this level. The second step, the second objective of the conspiracy, raising the prices at which the majors sold their gasoline in the Mid-Western area, followed automatically from the first step. Under the provisions of their jobber contracts, the price at which the majors sold to jobbers was determined by the spot market price and this price also fixed the prevailing level of retail prices in the Mid-Western area.

Plainly this combination conferred "power to control the market and to fix arbitrary and unreasonable prices." Plainly it was attained by combination, by elimination of competition. The majors were not buying from the independent buyers competitively, in the amounts which their business needs dictated, from the sources best suited to serve these needs, or at as favorable prices as possible. The quantity purchased, the source of purchase, and minimum price (i. e., not less than the going spot market price) were all fixed by agreement (*supra,* pp. 16–17, 19–20, 21–22, 26–29).

The mere fact that this combination involved the cooperation of the independent refiners does not in any way alter the control over market price vested in the majors. The higher prices which these refiners were able to obtain by reason of the artificial support to market price furnished by the majors' buying program assured the continued cooperation of the independent refiners. The majors through their power to continue or to withdraw buying support remained in full control of the situation. Thus any tendency by independ-

ent refiners substantially to increase production could be effectively curbed.[18]

The power to control market price conferred by such a combination and the dangers of an injurious exercise of this power would seem greater and more serious than in the case of a simple agreement to sell at uniform minimum prices. The inflexibility of minimum uniform sales prices puts the parties at a disadvantage in meeting outside competition. In addition, the individual parties to such an agreement are under the temptation to secure a larger share of the business by granting concealed or secret price concessions, so that the problem of policing is usually a difficult one.[19]

Since the "evil consequences" of the combination here are the same as in the *Trenton Potteries* case, the fact that the machinery of price control was different is immaterial. In determining the scope of the prohibitions of the Sherman Act, "all the difficulties suggested by the mere form in which the assailed transactions are

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[18] In the early part of the conspiracy production of all refiners was limited under the petroleum code. The evidence shows that after expiration of the code there was an active movement to limit the production of Mid-Continent independent refiners, carried out under the direction of defendant Boggs, president of their trade association. Ex. 766–808 (R. 3286–3301), as explained in Ex. 753 (R. 3281–2); Exs. 817–819 (R. 3311–4). See also Ruether's report (*supra*, note 41, p. 29) stating that, by virtue of the "dancing partner" arrangement, the buyer could use "his purchasing power to influence the operating program of the small refiners to stay within his allocation."

[19] When the principal sugar refiners agreed not to depart from their published prices without prior public notice of change, enforcement of the agreement required the adoption of more and more detailed rules covering the refiners' business dealings. See *United States* v. *Sugar Institute, Inc.*, 15 F. Supp. 817, 828–831, 834–861, 864–886, affirmed 297 U. S. 553.

clothed become of no moment." *American Tobacco Co.* v. *United States,* 221 U. S. 106, 180. As this Court has recently said, the restrictions of the act "are not mechanical or artificial," its general phrases are to be "interpreted to attain its fundamental objects", the act "aims at substance." *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 360, 377, *supra.*

The court below held that the question of the effect of defendants' combination "upon fair competition, and consequently the question as to whether it constituted an unreasonable restraint of trade, were questions of fact" which the trial court should have submitted to the jury (R. 3932). The court appears to have regarded the *Trenton Potteries* case as inapplicable to the case at bar for the following reasons: (1) It said that here the reasonableness of the restraint was defended upon the ground that the combination eliminated a competitive abuse; and the court interpreted the *Trenton Potteries* case as not barring defense of the reasonableness of the restraint upon this ground. (2) It said that a price-fixing agreement such as that involved in the *Trenton Potteries* case is one "which in its very nature, destroyed competition"; the authority of that case is confined to such an agreement; and the present combination did not destroy competition, it merely affected it.

In setting forth the first of these reasons the court said, referring to the *Trenton Potteries* case (R. 3930):

> It was not even claimed there was any purpose or object to correct a competitive abuse in the industry. There is nothing in the opinion to indicate that an agreement to raise or affect prices by the elimination of a competitive abuse

> is per se illegal or that the character of the restraint is not a proper jury question, under such circumstances.

The error in the above statement is twofold. In the first place, the court's assumption that in the case at bar the combination was simply "an agreement to raise or affect prices by the elimination of a competitive abuse", is contrary to the findings which the jury necessarily made when it convicted the defendants. Under the trial court's instructions to the jury it was required, in order to convict the defendants, to find that they had combined both for the purpose of raising and fixing spot market prices and for the purpose of thereby raising the prices at which they sold gasoline in the Mid-Western area (*supra*, pp. 62–64). In other words, the jury found that price raising and price fixing, as such, was the *primary* objective of the conspiracy. The characterization of the conspiracy by the court below flouts the jury's verdict although the opinion nowhere intimates that the evidence was insufficient to sustain the jury's findings.

In the second place, the court's statement misinterprets the scope of the holding of the *Trenton Potteries* case. As we have already stated (*supra*, pp. 79–80), that case held that the type of restraint there involved was a restraint which the statute made unlawful and that therefore, once the jury had found this type of restraint, no further question bearing upon the reasonableness of the restraint was open to jury consideration. Moreover, the very point which the court below said was not passed upon in the *Trenton Potteries* case was directly involved. In that case this

Court pointed out that the trial court had charged the jury that if it found a combination such as that alleged in the indictment, the defendants would be guilty without regard to "the good intentions of the combining units" (273 U.S. 392, 395). Respondents can scarcely deny that "good intentions" include the purpose to eliminate a competitive abuse. In addition, the trial court's refusal of various requested charges was held not to be error (*ib.*, p. 396), and among the charges so refused were two to the effect that cooperative action, taken as a measure of self-protection against trade abuses, does not constitute an unreasonable restraint of trade.[20]

The second ground upon which the court below distinguished the *Trenton Potteries* case was that the restraint was held unlawful as such in that case because *price-fixing* by a dominant group in an industry *destroys* competition, but that in the case at bar defendants' combination did not destroy competition "inasmuch as the buying programs complained of included only about one-third of the gasoline sold on the 'spot' market" (R. 3930, 3932).

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[20] Error was assigned to refusal of the following requested charges (*United States* v. *Trenton Potteries Co.* Record, pp. 3672, 3678):

"The defendants had the right by cooperative action to fairly protect themselves against trade evils and abuse and unfair methods of competition and unless the jury finds that they have done more than is fairly justified by self-protection, they should return a verdict of not guilty."

"Persons may make agreements as to prices, provided such agreements afford only the necessary protection to the persons making them in their business against ruinous competition or bad trade practices, and provided further such agreements are not made for the purpose of restraining trade."

The view of the court below that defendants' combination did not destroy competition on the spot market because the purchases constituted only one-third of spot market supply is not only in conflict with the jury's factual determination but represents a complete misunderstanding of what constitutes competition or a competitive market, under the circumstances of this case. The jury found that the defendants had entered into a combination to raise and maintain spot market prices, that they had the power in combination to effectuate this purpose, and that they had caused the rise in spot market prices and subsequent maintenance of this advance (*supra*, pp. 62–66). Thus, the jury determined as a matter of fact that all the gasoline sold in the spot market was sold in a market in which price was not competitively determined but was fixed and controlled by defendants' combination. The statement of the court below (R. 3932) that this gasoline "was sold on the market as had theretofore been done" is, therefore, in the teeth of the jury's contrary factual determination.

The further error into which the court below fell sprang from its failure to grasp the true nature of competition (and of its suppression) as the question is presented under the circumstances here. When most of the producers of a commodity agree upon minimum selling prices as in the *Trenton Potteries* case, all competition is not completely destroyed—the resulting suppression of competition does not ordinarily extend beyond the business of those combining, other producers being free to undercut the group's minimum prices. A

very different situation is presented when a powerful buying group undertakes to absorb such proportion of total market supply, and at such prices, that this gives control over the price at which all sales in the market are made. In that case the *entire* market is an artificial, rigged, non-competitive market. The suppression of competition grows out of the fact that buyers are deprived of the opportunity to purchase in a market in which the amount offered for sale and the prices demanded by sellers are freely and individually determined and are not the direct product of combination and concert.

An exactly comparable situation would be a pool of large stock market operators formed for the purpose of manipulating the price of a stock listed on a stock exchange.[21] Such a combination, utilizing its pooled resources for the ulterior purpose of manipulating price upward, would absorb all stock offered at the current market and, as price advanced under the influence of this buying, the prices at which the pool bought would correspondingly advance. A market subjected to this manipulation would not be a competitive market, and this characterization would apply to all market transactions, not simply to the sales to the pool, whether these

[21] A corner in future cotton contracts, engineered on a cotton exchange, has been held to constitute a violation of the Sherman Act. *United States* v. *Patten*, 226 U. S. 525. An agreement by packers, the principal purchasers at stockyards, to refrain from bidding against each other "except perfunctorily and without good faith" for the purpose of compelling owners of livestock "to sell at less prices than they would receive if the bidding really was competitive", has also been held to violate the Sherman Act. *Swift & Co.* v. *United States*, 196 U. S. 375, 391, 400.

sales were one-third, more than one-third, or less than one-third, of total market transactions.

In the court below respondents, in an attempt to show that spot market prices were competitively determined, placed much reliance upon evidence introduced by them (Ex. 1024, R. 3807) that the majors did not all purchase at the same price on the same day, that they frequently bought at a price below the low quotation in the trade journals, and that jobbers and industrial consumers frequently bought at prices above and below the trade journal quotations. This was evidence appropriate for the jury to consider on the issues tendered to it. Since, however, the district court's instructions did not in any way limit the consideration which the jury might give this evidence when passing upon defendants' power or purpose to raise and fix spot market prices, it seems irrelevant to the question whether the district court erred in its instructions to the jury. We nevertheless wish to point out the limited probative weight of this evidence.

The gasoline sold on the spot market is of two grades, third grade and regular, depending upon its octane rating. Gasoline may have an octane rating approaching the bottom or the top of either grade, and these and other variations in the character of the gasoline produced by the small refining establishments which sold on the spot market affect its value and price.[22] Accordingly, as Exhibit 1024 shows, spot market sales at prices slightly above and slightly below those quoted in the trade journals were an almost daily occurrence even

[22] R. 1608; also R. 1570, 1573, 1581, 1589-90, 1595, 1597, 1602.

when the high and low spot market prices thus quoted were absolutely stabilized. It is not surprising, therefore, to find like variations from the trade journal quotations in the sales to majors.

A larger proportion of the sales to majors than of the spot market sales were made at a price below the low trade journal quotation. This was a natural development which did not in any way militate against the success of defendants' undertaking. Certain majors might be inclined to shave the going market price a little bit. Their gasoline purchases from independent refiners were, apart from the effect on spot market price of the collective purchases, burdensome (*supra*, pp. 12–13, 22, 27–28). On the other hand, the independent refiners would clearly and materially benefit from the combination even though, in sales to majors, they received a little under the current spot market price. Thus, if the combination brought about spot market prices higher by ¼¢ than these prices would otherwise have been and if majors purchased at ⅛¢ under these higher prices, the independent refiner profited to the extent of ¼¢ a gallon on the two-thirds of his output sold on the spot market and to the extent of ⅛¢ a gallon on the one-third sold to majors.

II

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN THE EXCLUSION OF EVIDENCE.

The Circuit Court of Appeals viewed (R. 3941) the question of error in the exclusion of evidence as turning upon the court's decision upon the main issue in

the case; that is, that the question of the reasonableness of the restraint was not foreclosed by a finding by the jury of the purpose and power to control market price. Since most of the excluded evidence was offered on the issue of reasonableness, the court concluded inferentially that it was at least material.[1]

We agree with the court below that the materiality of evidence relating to collateral aspects of the reasonableness of the restraint is largely governed by the holding on the principal issue in the case. As we have shown (*supra*, pp. 64–66), the jury was charged, so far as is material here, that it might convict the defendants if it found that they had the purpose and power through their combination to raise and control prices. Conversely, the jury was instructed to acquit the defendants unless it made these findings (*supra*, pp. 62–64). Under this charge evidence tending to show that the restraint was reasonable based on collateral considerations was immaterial because the jury, if it found the purpose and power to raise prices, might convict despite any such showing and, in the absence of such findings, was bound to acquit without any such showing. If, as we have contended (*supra*, pp. 69–89), this charge was correct, evidence relating to this immaterial issue was properly excluded.

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[1] The court stated (R. 3941) that "no doubt, if the case had been tried upon" the theory which the Circuit Court of Appeals considered applicable, "the ruling of the court with reference to the admission of much of this testimony would have been different;" and that "the rule as to evidence proper to be considered, where the reasonableness of the restraint is in issue, is clearly announced in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238."

Notwithstanding the fact that determination of the principal issue in the case will probably dispense with the necessity for an inquiry into the question of possible error in the exclusion of evidence, we shall undertake to show that no prejudicial error was committed in this respect. This discussion will be general since the court below did not discuss the specific evidence involved but made only "general reference" to the three classes in which respondents grouped their rejected offers of proof, and since we do not yet know what particular evidence respondents will stress in their brief in this Court.

This discussion will show, we submit, that the trial court acted clearly within its discretion in the exclusion of evidence and that, if any error was committed, it was at most error not affecting matters of substance. This Court has said, where there was a lengthy trial involving a "great mass of evidence" and a "wide range of inquiry," that a new trial "is not lightly to be ordered on grounds of technical errors in ruling on the admissibility of evidence which do not affect matters of substance." *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 404, *supra*.

In the discussion which follows we shall for convenience adhere to the classification of the excluded evidence made by respondents in the court below.

A. *The district court did not err in excluding certain evidence relating to facts peculiar to the petroleum industry*

In their first class respondents grouped evidence offered by them to show the economic condition of the

petroleum industry at the time of the passage of the National Industrial Recovery Act, the provisions of the code of fair competition for the petroleum industry, and the efforts made by the Petroleum Administration under the code to obtain price stability for petroleum products.[2]

We submit that the record in this case compels the conclusion that the district court was unusually liberal in permitting the defendants to show the condition of the petroleum business at the time of the adoption of the code and its history during the code period. The record shows that the substance of all of the excluded evidence which was at all material or relevant to the issues in the case was established by other evidence.[3] The Circuit Court of Appeals observed (R. 3942) "that much of the refused testimony was of a cumulative nature," that there is "much testimony in the record relative to the history of the oil industry, the evils with which it was beset, and efforts made by the industry and various Governmental agencies, Federal and State, to alleviate the situation," and that a trial court "must be vested with a large amount of discretion in a situa-

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[2] The excluded evidence appears in the record as follows: R. 938–44, 957–9, 960–1, 963–76, 976–80, 992–5, 1037–41, 1046–52, 1056–7, 1122–4, 1125–7, 1150–2, 1153–4, 1156–7, 1428–32, 1832–7; Exs. for iden. 710 (R. 3141), 829 (R. 3324), 830 (R. 3329), 831 (R. 3329), 832 (R. 3330), 844 (R. 3367), 845 (R. 3372), 846 (R. 3376), 847 (R. 3386), 848 (R. 3389), 892 (R. 3489), 1029 (R. 3817).

[3] The exclusion of evidence concerning facts subsequently proved is not a ground for reversal. *Matheson* v. *United States*, 227 U. S. 540, 543.

tion of this kind" because "even a conspiracy trial cannot go on forever."

One example which respondents discussed as typical in the court below will serve to illustrate our point. The court excluded defendants' particular offer to show (R. 938–44) that Secretary Ickes in October 1934 opposed a cut in the price of crude oil threatened by certain independent refiners and took steps to persuade these refiners not to cut crude oil prices. The substance of this testimony was, however, clearly established by other evidence. Government counsel conceded that the price of crude oil was maintained at one dollar during the code period and the court so advised the jury (R. 951, 956). Defense witness Franklin testified to that fact on several occasions (R. 934, 936, 950, 952, 953) and also testified that this price was maintained at the "insistence" of the Secretary of the Interior (R. 951). Arnott testified, in substance, that independent refiners threatened to cut the price of crude oil in the fall of 1934 and that the Government discouraged this (R. 1694–5).

The defendants' showing concerning most of the other matters to which the excluded evidence in this class pertained was equally complete. Substantial evidence was admitted concerning the background of the code;[4] the adoption, pertinent provisions, structure, purpose, operation, and effect of the code;[5] the efforts of the Petroleum Administration to increase the price

[4] R. 925–30, 983–5, 1000, 1001, 1070, 1394.

[5] R. 945–51, 948–50, 1002–3, 1007–14, 1022–8, 952–3, 1181, 1212, 1686–8; Exs. 825, 826 (R. 3319–21).

of gasoline;[6] the economic condition of the independent refiners;[7] and the circumstances surrounding Secretary Ickes' letter of July 20, 1934, to Arnott.[8]

B. *The district court did not err in excluding certain evidence offered in an effort to show that the Petroleum Administration encouraged and acquiesced in activities for which the defendants were convicted*

The principal evidence in this class relates to a report of an industry committee to the Petroleum Administrative Board in March 1935 (Ex. 924 for iden., R. 3530); a telegram in May 1935 from the chairman of the board to Arnott concerning lubricating oil prices in Pennsylvania (Ex. 916 for iden., R. 3520); a final report of a subdivision of the board issued in June 1936 (Ex. 914 for iden., R. 3512); and testimony of a member of the board before a committee of the United States Senate in February 1937 (R. 1841–3). All of this excluded evidence was, we submit, indirect, remote, and ambiguous.[9]

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[6] R. 953–6, 1007–10, 1022–6, 1179–81, 1702–3, 1743–4; Ex. 835 (R. 3347).

[7] R. 931–7, 1041–2, 1168–9, 1180–1, 1328, 1693–5.

[8] R. 1002, 1172–3, 1274–6, 1688–91, 1737, 1796–8; Ex. 891 (R. 3487).

[9] The report of the industry committee (none of the members of which were defendants or affiliated with the defendants) stated in substance, among many other things, that it was understood by the committee that a buying program was under consideration by the industry and urged that the Administrator give it his approval and support (Ex. 924 for iden., R. 3530, 3558–60). Frey, the only member of the Petroleum Administrative Board who was called by the defendants, testified that after the report was received by the board it was decided to take no action on it

Where the defendants sought to establish so-called approval by the Government by direct evidence they were permitted to do so without limitation. They called only one member of the Petroleum Administrative Board, and the district court allowed them to examine him concerning conferences of Board members with Arnott and others at which major company purchasing was discussed (R. 1263–92).[10] Arnott also testified fully on this subject (R. 1698–1700, 1729–30), and the excluded evidence fell far short of his testimony on the issue of Government acquiescence.

Moreover, we submit that under the circumstances of this case the district court would have been justified in excluding all evidence relating to the claim of Government approval.[11] Respondents admittedly con-

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(R. 1323). The telegram concerning Pennsylvania (Ex. 916 for iden., R. 3520) merely suggested that Arnott consider the lubricating oil problem in that State. The telegram was over the signature of board chairman Fahy, but he was never called to explain it. The final report by the Marketing Division of the Petroleum Administrative Board referred briefly to the activities of the Tank Car Stabilization Committee (Ex. 914 for iden., R. 3512, 3518). It was issued in June 1936, well over a year after the commencement of the buying programs. No effort was made by the defendants to examine Frey concerning the report although he was responsible for it (R. 1281). The testimony before the Senate Committee (R. 1841–3), given several months after the indictment in the case was returned, is patent hearsay.

[10] As appears before (*supra*, pp. 36–37), on cross-examination of Frey it was developed that Arnott was warned by the board that he was conducting the buying programs on his own responsibility.

[11] There is now no issue of the suspension of the Sherman Act in this case. Respondents conceded in the court below that under the National Industrial Recovery Act (48 Stat. 195, 198) and under the code of fair competition for the petroleum industry

ducted their activities for many months after the expiration of the National Industrial Recovery Act and the code for the petroleum industry approved thereunder. We submit that evidence that Government officials, acting under the authority of that Act and the petroleum code, encouraged the defendants or that the defendants' activities were in furtherance of the objectives of the Act or code, even though it were material as to activities conducted by them during the code period, could have no bearing on the subsequent period when, following the expiration of the Act and the code, these officials were stripped of all authority derived therefrom.

We also submit that the two cases cited by the court below, *United States* v. *United States Steel Corp.*, 251 U. S. 417, 446–447, and *Fosburgh* v. *California & Hawaiian Sugar Refining Co.*, 291 Fed. 29, 36, 37 (C. C. A. 9th), are not authority for the admissibility of the kind of evidence here in issue. In the *Steel* case this Court, in rejecting a contention of the Government that the acquisition of a certain company by the defendant corporation was inspired by an intent to monopolize, referred (pp. 446–447) to testimony by President Roosevelt that he had approved the acquisition because it was economically necessary for the preservation and operation of the properties of the acquired company.[12] Thus, in that case evidence of approval

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defendants were bound to obtain formal authorization for the buying programs if they were to be immune from prosecution under the Sherman Act and that no such approval was obtained.

[12] It should be noted that the approval in the *Steel* case was established by direct evidence and not by evidence of the kind excluded by the district court in this case.

was material to show that the defendant's intention was other than as charged by the Government. Here the evidence was offered for no such purpose. On the contrary, it tended to establish the claim of the Government that the defendants intended to raise prices. Its only purpose was to attempt to justify that intention, but justification of this kind, even if established, could certainly constitute no legal defense for the defendants' activities.[13]

C. *The district court did not err in excluding certain evidence offered to show that gasoline prices in the Mid-Western area were not artificially high and noncompetitive*

The district court excluded evidence of (1) the trend of gasoline prices during the last three months of 1934,[14] (2) the relationship between the price of gasoline and crude oil during the years 1918 through 1935,[15] and (3) the relationship between gasoline prices and other commodity prices during the years 1933 through 1936.[16]

[13] The *Fosburgh* case was similar to the *Steel* case. It involved a suit in equity brought by the receiver of a candy company to cancel a contract for the sale of sugar to the company on the ground that a clause in the contract prohibiting resale by the buyer violated the antitrust laws. The question presented was whether the clause was included in the contract by the defendant sugar company pursuant to a Government war regulation under the Lever Act or whether it was included to restrain buyers from competing with the defendant company. The intention of the defendant was, therefore, material, and the court admitted evidence to show that the provision was inserted as a result of suggestions on the part of Government officials charged with enforcing that Act.

[14] Ex. 849 for iden. (R. 3397); R. 1061–2, 1491–1503.

[15] Ex. 955 for iden. (R. 3657); R. 1518–20.

[16] Exs. 956–959 for iden. (R. 3661–75); R. 1521–33.

All of this evidence was either remote from, or presented issues collateral to, the issue in the case with reference to which it was offered, namely, the cause of the price trend during the period of the conspiracy. Although it might have some slight relevancy to this issue, the trial judge was justified in excluding it if in the view of the court it was remote or had a marked tendency to introduce collateral contentions and issues, the exploration of which would divert the jury's attention from the principal issues in the case.[17] Exclusion of evidence for this reason is no ground for reversal in the absence of a clear showing that the trial court abused its discretion.[18]

Respondents particularly stressed in the court below the evidence concerning the trend of tank car gasoline prices in the last three months of 1934. The trend of prices during these months was upward and evidence was offered to show that this was due to the elimination of interstate shipments of "hot" gasoline. From this defendants sought to conclude that the price rise in 1935 was due, not to the buying programs, but to the passage of the Connally Act.

It is submitted that the exclusion of the evidence did not constitute an abuse of discretion. There was already substantial evidence in the record concerning the depressing effect on price of "hot" gasoline and the

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[17] *Schradsky* v. *Stimson*, 76 Fed. 730, 734 (C. C. A. 8th); *Golden Reward Mining Co.* v. *Buxton Mining Co.*, 97 Fed. 413, 416 (C. C. A. 8th); *New England Trust Co.* v. *Farr*, 57 F. (2d) 108, 110 (C. C. A. 1st).

[18] *Metropolitan Life Ins. Co.* v. *Armstrong*, 85 F. (2d) 187, 193 (C. C. A. 8th); *Chesterfield Manufacturing Co.* v. *Leota Cotton Mills*, 194 Fed. 358, 359 (C. C. A. 4th); *Lamborn* v. *National Bank of Commerce*, 15 F. (2d) 473, 474 (C. C. A. 4th).

tendency of the Connally Act to stabilize prices in 1935.[18a] The effect of this evidence was to present an additional controversy to the jury, that is, the causes for the price trend in 1934 before the conspiracy began. This in itself might have confused rather than aided the jury in passing upon the primary issue in the case, that is, the causes for the 1935 price trend. Moreover, whatever value the evidence had depended upon a clear showing that the elimination of interstate shipments of "hot" gasoline was the primary cause for the price rise in 1934. This, however, was a matter of controversy because a buying program was in operation during almost a month and a half of the last three months of that year (R. 1049–51).

In addition, a comparison of the trend of prices during the three months of 1934 with the trend of prices during the first three months of the 1935 buying programs shows that the price trends were substantially dissimilar.[19] The amount of the price increase was not the same;[19a] the range of the published quotations was far more flexible during the rise in 1934 than during the rise in 1935;[20] prices were much less stable during the

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[18a] R. 706–7, 985–6, 988–9, 1063–4, 1115–7, 1466, 1469, 1510–2; Exs. 713 (R. 3177), 989 (R. 3737).

[19] Compare Ex. 849 for identification (R. 3397) with the chart of the trend of prices in 1935, opposite p. 29, *supra*.

[19a] Defendants' proffered testimony shows that the Federal Tender Board was not established until October 25, 1934 (R. 1062). The low quotation of the Journal of Commerce advanced 1¼¢ from then until the 7th of November and the Oilgram 1⅛¢ as compared with the 1½¢ rise in 1935 (Ex. 849 for identification, R. 3395, 3397).

[20] On only 25% of the days during the advance in 1934 were the low quotations of the two journals the same, as compared with over 62% during the period of the advance in 1935. During

first thirty days after the price rise in 1934 than during the same period after the price rise in 1935;[21] and prices during the last 23 days of December 1934 were in sharp contrast with prices during the comparable period in 1935.[22]

III

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN USING, AND IN PERMITTING GOVERNMENT COUNSEL TO USE, THE GRAND JURY TRANSCRIPT TO REFRESH THE RECOLLECTION OF CERTAIN WITNESSES

The Circuit Court of Appeals held (R. 3945–8) that the district court committed prejudicial error in refusing to permit defense counsel to inspect the transcript of grand jury testimony used to refresh the recollection of certain witnesses called by the Government. Respondents also contended in the court below that there were certain other errors involved in the use of the grand jury transcript for this purpose but the Circuit Court of Appeals did not pass upon these.

1934 the spread between the low and the high of the Oilgram exceeded ⅛¢ 91% of the time, as compared with only 10% in 1935.

[21] During the 1935 period there was not a single fluctuation in either the high or low quotations of either journal. In 1934 there were several variations in the lows of both journals. During 76% of the time in 1934 the spread between the high and low of the Journal of Commerce was greater than ⅛¢. In 1935 the spread for both journals was uniformly ⅛¢. During 44% of the time in 1934 the lows of the two journals varied. In 1935 the lows were identical throughout the time.

[22] In the last 23 days of December 1934 there was a highly fluctuating market with frequent variations in both the high and low quotations of both journals and wide variations between the respective quotations of the two journals. During the comparable period in 1935 there was not a single fluctuation in either of the journals and both were identical.

Before considering the question decided by the court below and the further questions raised by respondents' other contentions, it may be helpful to describe how and why the grand jury transcript was used in the trial and the results accomplished by its use. This, we believe, may serve the two-fold purpose of furnishing a background for the argument which follows and of showing the relatively unimportant role of the grand jury transcript in the trial.

All of the important witnesses called by the Government were either representatives of, or closely allied with, the defendant companies.[1] As a consequence, they were hostile, reluctant to testify, and evasive. This hostility is not so apparent in the present record, but it sufficiently appears from comments of the district court provoked by the hostility manifested,[2] from unresponsive answers of one witness volunteering facts favorable to the defendants,[3] and from the contrast between the direct examination and "cross-examination" of certain of the witnesses.[4]

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[1] R. 356, 506, 558, 623, 670, 726, 728, 789.

[2] Concerning Jacobi, the witness as to whom the grand jury testimony was used most often to stimulate memory, the trial court said (R. 503): "It is very apparent that this witness is hostile to the Prosecution. If you noticed, when he was taken over on cross-examination by counsel for the defense he was very responsive; there was nothing evasive; he answered fully. Right now, on direct, he is hesitating, he is reluctant, he is hostile."

See, also, the comments of the district court concerning the witnesses Lanzer and Evans (R. 264, 553).

[3] R. 358, 367–8, 395–9.

[4] Compare Jacobi's and Evans' testimony on direct with the part of their testimony on cross-examination appearing in this record in question and answer form (R. 475–7, 551–3).

Each of these witnesses had testified before the grand juries which returned the indictments in the case. When, therefore, the memory of a witness failed or he appeared evasive or reluctant to testify,[4] or when his testimony appeared to be contrary to that given before the grand jury,[5] the Government invoked the rules announced by this Court in *Hickory* v. *United States*, 151 U. S. 303, 308–309, and *St. Clair* v. *United States*, 154 U. S. 134, 150, and requested permission from the court to cross-examine the witness and to refresh his recollection by reading to him excerpts from his grand jury testimony. No impeachment of the witness was intended by this procedure but its sole purpose was, as repeatedly stated by counsel for the Government and by the trial court,[7] to attempt to stimulate the witness' memory.

Because under the rulings in the above cases the right to cross-examine and to confront the witness with prior contradictory statements depended to some extent upon a showing of surprise or hostility, counsel for the Government, as a predicate for permission to proceed as described, on occasion informed the court that he was surprised by the witness' testimony and that it contradicted testimony given before the grand jury.[8] Such claims were infrequent, however. Usually counsel merely asked the witness if his memory could be refreshed by his grand jury testimony.[9]

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[4] See, e. g., R. 359, 423, 442–4.
[5] See R. 372–80, 381.
[7] R. 263–6, 359–60, 455, 472, 2422.
[8] R. 263, 373, 407.
[9] 402–3, 414, 421, 423, 442, 453.

During the early stages of the trial the grand jury testimony was read to the witness by counsel for the Government from his notes (R. 446). When objection was made to the use of these notes the district court instructed counsel to use the transcript (R. 447). Very early in the trial the court adopted the practice, consistently followed the eafter, of inspecting the transcript and, itself, quickening the witness' memory by reading from his prior testimony.[10] At no time was the transcript ever shown to the witness.

The Circuit Court of Appeals stated (R. 3945) that grand jury testimony was read or referred to some 90 times, and that over 1,000 lines of the record consist of excerpts from the grand jury transcript. We submit, however, that the mere number of references to grand jury testimony or the number of lines of such testimony in the record are, standing alone, of very little significance. One thousand lines is a relatively insignificant part of a record containing many thousands of lines of testimony developed in a trial consuming over three months. Then, too, of the 1,000-odd lines of quotation from the grand jury transcript, over 450 lines are found in the testimony of the witnesses Steiger and Mosher (R. 728–811). Use of the grand jury testimony in their examination could not possibly have been prejudicial to respondents since their testimony related to a charge in the indictment directed against the trade journals which was not established by the evidence and was not submitted to the jury.

[10] See R. 456 where this practice was first adopted.

The really significant fact concerning the use of the grand jury transcript is that virtually no evidence was adduced by this means. The record shows that over 84% of the attempts by counsel for the Government to refresh the recollection of witnesses during the trial, either by reading verbatim or paraphrasing the witness' grand jury testimony, failed.[11] In only 14 instances where the grand jury testimony was used can it be said that any affirmative testimony whatever was given by the witness.[12] We consider it unnecessary to discuss this testimony, relating as it does to minutiae in the evidence, since respondents at no time have urged that it was of importance.

A. *The refusal of the district court to permit inspection of the grand jury transcript by defense counsel was not reversible error*

This Court has not passed upon the question of the right of opposing counsel to inspect a document used by counsel for the other party to refresh the recollection of a witness. Lower federal courts have held that in a criminal case counsel for the defendant has the right upon proper demand to inspect a document which is used by a witness on the stand for the purpose of re-

[11] R. 373–7, 378–9, 379–80, 381, 388, 402–3, 405, 407, 421–2, 423–4, 424–5, 425–7, 438, 440, 440–1, 444, 448–9, 450–1, 453, 453–4, 455–6, 463, 466–7, 500, 507, 508–9, 517, 517–9, 520–1, 521–2, 528–9, 531–2, 532, 533–5; 536–7, 547–8, 573, 575–6, 597, 606, 627, 628–9, 633–4, 637, 647–9, 660, 672–3, 679, 681, 683–4, 727, 728, 737, 738–9, 739–41, 743, 744–5, 754–6, 756–7, 758–9, 759–60, 761, 761–3, 768–9, 771, 772–4, 775–6, 778–80, 782–3, 783–4, 794–7, 801–2, 803–4.

[12] R. 263–5, 359–60, 394, 437, 441, 442–4, 445, 462, 628–30, 652, 654–5, 657–8.

freshing his recollection.[18] Assuming the correctness of this rule, the Government contends that the denial of inspection in this case is not a ground for reversal because (1) refusal to permit inspection by defense counsel was not prejudicial to respondents, and (2) defense counsel were accorded the equivalent of inspection to the extent that they were entitled to such.

1. THE REFUSAL OF THE DISTRICT COURT TO PERMIT INSPECTION BY DEFENSE COUNSEL WAS NOT PREJUDICIAL TO RESPONDENTS

The reasons for permitting inspection of a writing shown to a witness and used by him on the stand to refresh his recollection are (1) to enable opposing counsel to detect any improper communication by counsel using the writing to his own witness and (2) to permit opposing counsel to determine and to test by cross-examination whether testimony which purports to be given as the result of the writing is the result of bona fide refreshment. *Lennon* v. *United States*, 20 F. (2d) 490, *supra;* Wigmore on *Evidence*, Vol. 2, Sec. 762 (2nd Ed., 1923). The Government contends that because neither of these reasons for inspection was present here the refusal to permit inspection, if erroneous, was harmless error.

The first reason—to detect improper communication—was obviously nonexistent. Any attempt at such communication by Government counsel was unlikely

[18] *Little* v. *United States*, 93 F. (2d) 401, 406–407 (C. C. A. 8th); *Morris* v. *United States*, 149 Fed. 123, 125–126 (C. C. A. 5th). See also *Lennon* v. *United States*, 20 F. (2d) 490, 493–494 (C. C. A. 8th).

since all of the witnesses whose recollection the Government attempted to stimulate by use of the grand jury transcript were hostile to the Government. Moreover, no such communication could have been made by means of the transcript because it was never shown to a witness but was read aloud in open court by Government counsel and the district court.

The second reason for permitting inspection, that is, to enable defense counsel to test by cross-examination whether testimony elicited was actually the result of refreshment, was also absent. As stated before (*supra*, p. 104), no testimony of any consequence was inspired by the use of the grand jury transcript. Cross-examination by the defendants was, therefore, unnecessary and the refusal to permit them to have the transcript for such cross-examination was immaterial. See *Taylor* v. *United States*, 19 F. (2d) 813, 818–820 (C. C. A. 8th).

We submit that the question of prejudice to the respondents *by the denial of inspection* should be limited to the foregoing inquiry. If neither of the recognized reasons for permitting inspection was present, it is difficult to see how, if any prejudice was sustained by the respondents from the use of the grand jury transcript, it could be said to flow from this alleged error.

The Circuit Court of Appeals, however, concluded that the respondents were prejudiced by this alleged error for a different reason. The court stated (R. 3946) that the "damaging effect" was the use of the grand jury transcript "in connection with statements made by counsel for the Government" which tended to give the jury the impression "that the witness was deliberately

testifying falsely."[14] The opinion does not make clear the relationship between any such impression by the jury and the refusal of inspection. It is likely, however, that the court intended to adopt the argument of the respondents, that is, that the refusal to permit inspection in some way prevented respondents from cross-examining the witnesses with the use of the grand jury tesitmony to show that they were not falsifying.

We submit that the determination of the court below that the refusal of the district court to permit inspection prejudiced the respondents in this manner is based on unwarranted assumption and speculation. If the jury received the impression that the witnesses were falsifying, it is far more likely that it was the result of the hostile, reluctant, evasive demeanor of the witnesses themselves, so pronounced as to be remarked upon by the trial judge (*supra,* note 2, p. 101), than that it resulted from the remarks of Government counsel.

Most of the comments by Government counsel were clearly innocuous. The particular comments referred to in the opinion of the court are by no means typical

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[14] The remarks to which the court referred are set forth in a footnote to the court's opinion (Fn. 9, R. 3947). The court did not expressly hold that the remarks of counsel were improper. The tone of the opinion is, however, critical. We submit that even when the importance of the remarks is magnified by their being torn from their context and assembled together, they were not improper. The isolated claims of surprise and inconsistent grand jury testimony are recognized predicates for cross-examination of a party's own witness under the decisions of this Court (*supra*, p. 102). The other remarks did not, we submit, go beyond the bounds permissible to counsel in prodding an obviously reluctant witness and inducing him to correct his testimony.

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of the remarks which were usually made by Government counsel. In most instances counsel merely asked the witness if his recollection could be refreshed by his grand jury testimony without claiming surprise or stating that the grand jury testimony appeared to be contradictory (*supra*, p. 102).

Nor is there reason to believe on the face of this record that even the comments of the kind referred to by the court below made any impression upon the jury. During the trial defense counsel objected to only three of the ten remarks referred to in the opinion of the court below.[18] It is submitted that if these statements did not at the time impress counsel as being sufficiently harmful to require objection by them or instruction from the court it is most unlikely that they materially affected the jury.

Moreover, if counsel for respondents believed that the jury had the impression that the witnesses were falsifying and really felt that they could have corrected this impression by cross-examining the witnesses as to their grand jury testimony, they heard read aloud, and had available to them in the record of this case, all of the grand jury testimony brought to the attention of the witnesses. No such cross-examination was attempted.

Under Section 269 of the Judicial Code error which does not affect the substantial rights of the parties is not ground for reversal. Since the only prejudice

[18] Objection was taken only to the second, eighth, and tenth comments quoted in footnote 9 to the court's opinion (R. 3947).

claimed from the refusal to permit inspection rests upon mere surmise and speculation, the Circuit Court of Appeals erred in holding that this refusal was ground for reversal.

2. RESPONDENTS WERE ACCORDED THE EQUIVALENT OF ALL THE INSPECTION TO WHICH THEY WERE ENTITLED

Although opposing counsel may be entitled to inspect a document used by a witness to refresh his recollection, the right has a definite limitation. Opposing counsel is not entitled to inspect the entire document but may inspect only those parts which are called to the attention of the witness or which relate to the subject on which refreshment is attempted. *Brownlow* v. *United States,* 8 F. (2d) 711 (C. C. A. 9th).

Under this limitation respondents were entitled to see at most only (1) the parts of the grand jury testimony actually read to the witness and (2) any additional grand jury testimony of the witness relating to the question on which counsel was attempting to stimulate recollection. This, we submit, is especially true in view of the confidential nature of the grand jury testimony. See *Metzler* v. *United States,* 64 F. (2d) 203, 206 (C. C. A. 9th).

We submit that the respondents had the equivalent of all inspection demanded by them. As stated before (*supra,* p. 103) where the witness was referred to his grand jury testimony the testimony was read aloud in open court and was transcribed verbatim by the reporter. All of this testimony—all of the refreshing material—was therefore available to respondents.

As to any other grand jury testimony of the witness on the subject on which he was questioned (assuming there was any such), respondents cannot complain that inspection was not permitted since they made no specific demand for such inspection. Respondents moved the court (R. 471–2) to be permitted to inspect (1) the entire transcript of the testimony of the witness before the grand jury (to which, as we have seen, they were not entitled), and (2) those portions of the testimony actually read to the witness to refresh his recollection (which, as shown above, they actually had). No motion was made to permit inspection of those parts of the transcript, if any, not read to the witnesses which might have related to the subject on which refreshment was attempted.

As we have seen, on most of the occasions when the transcript was used the court inspected it, and, itself, read the testimony to the witness (*supra*, p. 103). On occasion the court declined to read excerpts from the transcript because inspection of other grand jury testimony of the witness led the court to believe that the witness' recollection would not be refreshed by the particular excerpts.[16] In the course of the testimony of one witness the court declined to permit Government counsel to make further use of the grand jury transcript until the court could go over it "a little more thoroughly."[17] The failure of defense counsel at least to request the district court to ascertain whether there was any additional grand jury testimony relevant to the part read by the court indicates, we submit, that

[16] R. 756. See also R. 544–5.

[17] R. 684.

there is good reason to believe that where testimony was read by the court it represented all of the relevant grand jury testimony.

B. The other alleged errors in the use of the grand jury transcript urged by respondents but not passed upon by the Circuit Court of Appeals are not grounds for reversal

1. THE DISTRICT COURT DID NOT ERR IN PERMITTING REFRESHMENT OF RECOLLECTION BY READING FROM A TRANSCRIPT OF GRAND JURY TESTIMONY WHICH HAD NOT BEEN FORMALLY AUTHENTICATED

Respondents' contention in the court below that it was error for the district court to permit the use of the grand jury transcript without its first being formally authenticated is the result of a failure to appreciate that the rules that govern the use of prior testimonial statements vary with the purpose and nature of the use to be made of such statements.

Where a prior statement is used (1) to impeach the testimony of a witness or (2) to prove, under the doctrine of past recollection recorded, facts concerning which the witness has no present recollection, authentication of the prior statement is necessary.[18] The reason is the same in both instances. The prior statement, itself, becomes evidence in the case to be considered by the jury—in the first instance, in determining the credibility of the witness, and in the second, in passing upon the issue of fact to which the statement relates. The usual standards for judging the probative

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[18] *Bates v. Preble*, 151 U. S. 149, 154–157; *New York Life Ins. Co. v. Neasham*, 250 Fed. 787, 789 (C. C. A. 9th); Wigmore on *Evidence*, Vol. 2, Sec. 745 (2nd Ed., 1923).

value of all evidence, including authenticity, are, therefore, applicable to the prior testimonial statement.

In the present case the grand jury transcript was not used for either of the above purposes. It was not offered or received in evidence. Instead, as we have seen (*supra*, p. 102), it was used solely to refresh the recollection of the witness, that is, to stimulate his memory so that he could testify to the facts independently of the transcript. Where a prior testimonial statement is so used its function ends with the effort to revive recollection. Whether the witness' memory is refreshed or not, the only evidence before the jury is the testimony of the witness and the jury is not permitted to consider the prior statement for any purpose. It is merely a part of the permissible leading question by counsel and forms no part of the testimonial answer of the witness. Since the statement has no evidentiary purpose whatever, the rules of evidence are inapplicable. The sole test is: Is there reasonable probability that the witness' memory may be stimulated by the prior statement so that he can now testify from present independent recollection? If so, it is immaterial whether the document containing the prior testimonial statement—in this case the transcript of the grand jury testimony—was prepared by the witness or under his direction, or whether it is an original or a copy.[19]

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[19] *Henowitz* v. *Rockville Savings Bank*, 118 Conn. 527, 529–530; *Volusia County Bank* v. *Bigelow*, 45 Fla. 638, 646–647; *Commonwealth* v. *McDermott*, 255 Mass. 575, 580–581; *Sagers* v. *International Smelting Co.*, 50 Utah 423, 427–431; *Mahoney's Admr.* v. *Rutland R. R. Co.*, 81 Vt. 210, 214–215; *State* v. *Paschall*, 182 Wash. 304, 308–309; *Folsom* v. *Apple River Log-Driving Co.*, 41

In *New York, etc., Mining Co.* v. *Fraser,* 130 U. S. 611, a witness for the plaintiffs, after being handed a paper the authorship of which was not revealed, stated that it was a copy of an account outstanding between the parties and thereupon testified over the defendant's objection to the items of the account. This Court held (pp. 619–620) that the use of this document, which appellant described as "an unproved copy of an unproved account," was not error since it appeared that the paper itself was not admitted in evidence, but was merely used by the witness "as a memorandum with which to refresh his recollection."

See also *Hoffman* v. *United States,* 87 F. (2d) 410, 411 (C. C. A. 9th); *Briggs Mfg. Co:* v. *United States,* 30 F. (2d) 962, 965 (D. C. Conn.), reversed on other grounds, *United States* v. *Briggs Mfg. Co.,* 40 F. (2d) 425 (C. C. A. 2d).

Of the three federal cases upon which respondents relied in the court below, two are not in point. *New York Life Ins. Co.* v. *Neasham,* 250 Fed. 787, 789 (C. C. A. 9th), *supra,* involved a writing used for impeachment. In *Tibbitts-Hewitt Grocery Co.* v. *S. E. Lux, Jr., Mercantile Co.,* 5 F. (2d) 549, 551 (C. C. A. 8th), although a writing used for refreshing recollection was involved, no question of authentication arose or was decided. The third federal authority relied upon was a dictum from *Putnam* v. *United States,* 162 U. S. 687, 694, to the effect that a memorandum used to refresh must have been prepared by, or under the direction of, the witness. This is of doubtful scope and application since the Court

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Wis. 602, 606–608; Wigmore on *Evidence,* Vol. 2, Secs. 759–761 (2nd Ed., 1923).

quoted on the same page of its opinion an extract from Greenleaf on *Evidence* to the effect that where a written document is used to refresh recollection, it "does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection."

2. THE DISTRICT COURT DID NOT TRANSCEND THE LIMITS OF SOUND JUDICIAL DISCRETION IN PERMITTING EXCERPTS FROM GRAND JURY TESTIMONY TO BE READ TO WITNESSES FOR THE PURPOSE OF REFRESHING RECOLLECTION

Respondents contended in the court below that the reading of excerpts from the grand jury testimony of certain witnesses while they were on the stand led the jury to conclude that testimony so read was affirmative evidence in the case. In order to maintain this contention here respondents must affirmatively establish that the jury reached this erroneous conclusion. Furthermore, in order to establish that error was committed, respondents must ask this Court to assume that the jury disregarded the instructions which were given them by the district court. During the course of the trial the court on several occasions warned the jury that it must ignore the grand jury testimony (R. 380, 449, 591). In addition the district court in its final charge to the jury stated (R. 2422):

> Testimony given by some of the witnesses in this case when they appeared before the Grand Jury, was read to them when they appeared as witnesses in this trial. *This was done for the purpose of refreshing their memory, and for no other purpose.*

There is, of course, no categorical rule of law which prohibits the use of grand jury testimony to refresh the recollection of hostile witnesses. It is well settled that it rests in the sound judicial discretion of the trial court to permit counsel to endeavor to refresh the recollection of a hostile witness or to induce an evasive witness to correct his present testimony by reading to him in the presence of the jury prior statements which he has made whether before a grand jury [20] or elsewhere.[21] There is reversible error only when the examination is so conducted that the effect is necessarily to lead the jury to believe that the prior testimony is in itself affirmative evidence in the case.

The two cases upon which respondents chiefly relied, *Rosenthal* v. *United States*, 248 Fed. 684 (C. C. A. 8th), and *United States* v. *Block*, 88 F. (2d) 618, 619–620 (C. C. A. 2nd), are cases where the manner in which the examination was conducted clearly led the jury to treat the prior testimony as evidence in the case. In the former, counsel read to the witness "all of his testimony" given on a prior examination and asked him, as "every" question and answer was read before the jury, whether

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[20] *Bosselman* v. *United States*, 239 Fed. 82, 85 (C. C. A. 2nd); *Felder* v. *United States*, 9 F. (2d) 872, 874 (C. C. A. 2nd); *Di Carlo* v. *United States*, 6 F. (2d) 364, 367–368 (C. C. A. 2d), cert. den. 268 U. S. 706; *Levy* v. *United States*, 35 F. (2d) 483, 484–485 (C. C. A. 8th); *United States* v. *Freundlich*, 95 F. (2d) 376, 379 (C. C. A. 2nd).

[21] *Hickory* v. *United States*, 151 U. S. 303, *supra*, 309; *Buckley* v. *United States*, 33 F. (2d) 713, 717 (C. C. A. 6th); *Curtis* v. *United States*, 67 F. (2d) 943, 946 (C. C. A. 10th); *United States* v. *Lonardo*, 67 F. (2d) 883, 884 (C. C. A. 2nd); *Bedell* v. *United States*, 68 F. (2d) 776, 777–778 (App. D. C.).

he had so testified. It was held that this procedure did not constitute refreshment "but was in fact introducing" testimony of the witness given out of court. In the *Block* case the prosecutor, after failing in an attempt to refresh the recollection of the witness from testimony given by him on a prior examination, "began to read the examination, question and answer," asking after each passage whether it was true and this "was continued until the whole of the statement had been read to the jury." The court held that error had been committed because the jury had been allowed to take statements of the witness made out of court "as his testimony on the stand."

In *Chase* v. *United States,* 13 F. (2d) 847, 848 (C. C. A. 6th), another case cited by respondents, the facts were substantially like those in the *Block* case. Neither of the two other cases cited, *Nardi* v. *United States,* 13 F. (2d) 710, 711 (C. C. A. 6th), and *Stewart* v. *Morris,* 88 Fed. 461, 462 (C. C. A. 7th), rehearing denied, 89 Fed. 290, involved the point under discussion.[22]

We submit that the facts of this case wholly fail to show that there is any reasonable ground to believe that the jury considered the grand jury testimony as affirmative evidence in the case. Not only was the jury prop-

[22] In *Nardi* v. *United States*, *supra*, the question decided was whether a prior statement was sufficiently contemporaneous with the events to which it related to be reliable and a proper basis for refreshment. The court followed the doctrine of contemporaneousness laid down in *Putnam* v. *United States*, 162 U. S. 687, which we discuss later (*infra*, pp. 117–121). In *Stewart* v. *Morris* a memorandum used to refresh the recollection of a witness was improperly introduced in evidence.

erly instructed in this matter (*supra*, p. 114) but the district court exercised close supervision and control over the examination of witnesses on the basis of the grand jury transcript. On most occasions the court inspected the portion of the transcript proposed to be used by counsel and itself assumed the task of quickening a witness' failing memory by referring him to his prior testimony.[23] The court frequently *sua sponte* called a halt when it thought that Government counsel were about to go too far in their questioning.[24] When a witness, after hearing an excerpt from his grand jury testimony read, testified that his recollection was not refreshed, the inquiry was abandoned by Government counsel, and the court, whenever requested to do so, ordered the questions and answers which had been read to be stricken out.[25] Where the grand jury testimony was not inconsistent, the inquiry was either abandoned or the jury instructed to disregard the questions and answers which had been read.[26]

3. THE DISTRICT COURT DID NOT ERR IN PERMITTING REFRESHMENT OF RECOLLECTION BY MEANS OF GRAND JURY TESTIMONY WHICH WAS NOT STRICTLY CONTEMPORANEOUS WITH THE EVENTS TO WHICH IT RELATED

Respondents' final contention in the court below was that the district court erred in permitting refreshment

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[23] R. 378, 424, 449–51, 456, 508–9, 518–9, 520–1, 521–2, 528–9, 531–6, 647–8, 659, 740–1, 754–6, 756, 758, 760, 764–9, 771, 772–3, 775, 783, 784, 795–6, 801, 803.

[24] R. 377, 380, 394, 426, 444, 448, 520, 522, 535, 545, 651, 652, 657, 754, 756, 774, 776, 778, 795.

[25] R. 424–5, 453–4, 455–6, 521–2, 633–4, 637, 672–3, 759, 760, 761, 762–3, 768–9, 783–4.

[26] R. 266, 388, 422, 517, 518–9, 660, 684, 754, 756, 757.

of recollection with grand jury testimony which was not given contemporaneously with the events to which it related. This contention is based upon *Putnam* v. *United States*, 162 U. S. 687, *supra*, in which this Court held that it was not permissible to refresh the recollection of a witness by the use of noncontemporaneous grand jury testimony.

Contemporaneousness is required to assure that the prior statement of the witness was not the result of memory impaired by a substantial lapse of time between the statement and the event to which it refers, and thereby to assure the accuracy of testimony on the witness stand stimulated by reference to such statement. *Putnam* v. *United States*, *supra*, pp. 696–697. Since in the present case no material testimony substantially affecting the rights of respondents resulted from stimulation of memory by the use of grand jury testimony, the accuracy of the grand jury testimony, which the rule of contemporaneousness is designed to secure, was immaterial. Under these circumstances, even if there was error in permitting attempts to stimulate memory by noncontemporaneous prior testimony, the error was harmless and is not a ground for reversal.

Aside from the lack of prejudice, we submit that the district court did not err in permitting refreshment by the use of grand jury testimony (1) because the holding of the *Putnam* case is unsound in principle and should be overruled and (2) because the holding has no application to the facts of this case.

The facts and holding of the *Putnam* case are as follows: The president of a national bank was charged with abstracting certain bonds belonging to the bank.

A witness called at the trial had testified before the grand jury that the defendant had told the witness on a particular day four months before his grand jury testimony that he (the defendant) had the bonds. The grand jury testimony was used to refresh the witness' memory as to these statements by the defendant. The Court held, three justices dissenting, that the trial court had erred in permitting refreshment because of the lapse of time between the conversation in question and the grand jury testimony concerning it."[27]

Since this decision in 1896, this Court has, so far as we are aware, had no occasion again to consider the question of contemporaneousness. The rule of the *Putnam* case has been the subject of vigorous criticism by text writers[28] and on several occasions state courts have ignored or expressly declined to follow it.[29]

We respectfully request that the Court now reconsider the holding in the *Putnam* case if it be regarded as applicable here. It may be conceded that where a prior testimonial statement is introduced in evidence

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[27] It should be noted that this portion of the opinion in the *Putnam* case was not necessary to the decision. The defendant was convicted on two counts, the sentences imposed ran concurrently and the Supreme Court found no error in the conviction under one of the counts. The Court took cognizance of this and said (p. 714) that "it is doubtful whether the error committed, as to the second count, should be treated as prejudicial."

[28] See Wigmore on *Evidence*, Vol. 2, Sec. 761, fn. 5 (p. 42) (2nd Ed., 1923); Greenleaf on *Evidence*, Vol. 1, pp. 540, 544 (16th Ed., 1899).

[29] *Mahoney's Admr.* v. *Rutland R. R. Co.*, 81 Vt. 210, *supra*; *Folsom* v. *Apple River Log-Driving Co.*, 41 Wis. 602; *Davis* v. *Field*, 56 Vt. 426; *Bank of Charleston National Banking Ass'n* v. *Zorn*, 14 S. C. 444; *Sagers* v. *International Smelting Co.*, 50 Utah 423.

as representative of the past recollection of the witness concerning a fact about which he has no present recollection there is good ground for requiring that the statement be made contemporaneously with the event to which it relates. We submit, however, that on principle there is no reason for applying this rule to a prior statement which is used solely to refresh the present recollection of a witness. In that situation it is the testimony of the witness alone which goes to the jury and the prior statement has no evidentiary purpose. The appropriate test is whether the prior statement is reasonably calculated to revive the witness' recollection and it seems clear that under many circumstances a witness' recollection may be revived by a noncontemporaneous statement. Whether such a statement may stimulate memory is, we submit, a matter for the discretion of the trial court and should not be absolutely prohibited as a rule of law.

We submit that at least the holding in the *Putnam* case should be given a limited application. The view expressed in that case that there was no "reasonable probability that the memory of the witness, if impaired at the time of the trial, was not equally so when his testimony on the prior occasion was committed to writing" is to be read in the light of the situation to which these words were directed, a single isolated conversation concerning a matter in which the personal interest of the witness was in no way involved. In that situation a four-months-old memory might be distrusted (although it would not seem unreasonable to leave decision in such a matter to the discretion of the trial court).

We cannot believe, however, that the *Putnam* case was intended to set up an inflexible four-months statute of limitations which would have the effect of barring as a stimulus to recollection any statement made more than four months after the event to which it relates. Where the prior statement used for refreshment concerns events in which the witness actively participated, or relates to business matters with which he was required to be familiar in the course of his regular employment, or constitutes an admission of facts against his own interest or against the interest of his employer, the same yardstick cannot be applied in measuring the point of time at which a statement concerning past events is to be presumed to be the product of a faulty memory. With some trifling exceptions, this was the kind of prior statement used for refreshment in the present case.

Furthermore, in the case at bar the grand jury testimony employed for the purpose of refreshment was given in the early summer of 1936 when the continuing conspiracy to which it related was still in current operation. The testimony may be said to have been contemporaneous with the whole conspiracy of which the facts given in the testimony were parts. There is reason to expect a witness to remember accurately prior events occurring in the course of a continuing enterprise in which he is still engaged. We submit that under these circumstances there was in the present case no such lapse of time between the event and the testimony thereto as to render the accuracy of the latter inherently suspect and, as a matter of law, not a proper subject for stimulating recollection.

IV

THE CIRCUMSTANCES OF THIS CASE FURNISH NO BASIS FOR A REVERSAL OF THE JURY'S VERDICT UPON THE GROUND OF IMPROPER, PREJUDICIAL ARGUMENT BY GOVERNMENT COUNSEL

Respondents, in support of the contention that the jury verdict should be reversed because of improper and prejudicial argument by Government counsel, have relied upon statements in the Government's opening to the jury and in its closing argument to the jury. In the printed record these arguments are 240 pages in length,[1] and the opening and closing arguments are separated in time by over three months (R. 74, 2037). Obviously to assemble together extracts, torn from their context, from arguments of such length gives a totally misleading impression of the character of the argument as a whole and of its probable effect upon the jury. The court below, after stating that it had read the entire argument, said that "the argument, as a whole, does not disclose a picture as prejudicial to appellants as is argued or as is indicated by the particular statements referred to" (R. 3949).

Since the court below had concluded that other grounds required reversal of the judgments against respondents, it found it unnecessary to decide whether these extracts from the argument by Government counsel were ground for reversal, but it said that in its opinion the argument, taken in connection with comments made in using grand jury testimony to refresh recollection, "would present a very serious obstacle to the affirmance of the judgment" (R. 3950). The court,

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[1] R. 74–94, 96–113, 2037–2145, 2285–2380.

however, totally ignored one very important consideration, namely, that, with trifling exceptions, either defense counsel made no objection at the time to the remarks complained of or, where objection was taken, the trial court took proper corrective action (*infra*, pp. 127–129).

Whether misconduct of counsel in a given case is of sufficient importance to require reversal of the jury's verdict "depends wholly upon the circumstances of the case, and for that reason authorities are of little persuasion." *Mutual Life Ins. Co. v. City Nat'l Bank & Trust Co.*, 86 F. (2d) 660, 663 (C. C. A. 7th). One of the most important circumstances to be considered in this connection is whether the evidence against the party against whom the jury returned a verdict was weak or was strong and convincing. This Court has said that if the evidence was weak, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence," but that, if the evidence was strong, "a different conclusion might be reached" respecting the necessity of reversal because of misconduct of counsel. *Berger* v. *United States*, 295 U. S. 78, 89.[2]

The two leading cases in which this Court has held misconduct of counsel a ground for reversal of a jury verdict are *Berger* v. *United States, supra,* and *New*

[2] Compare the opposite conclusions reached by the same Circuit Court of Appeals in two cases involving almost identical conduct of counsel. *Chadwick* v. *United States*, 141 Fed. 225, 245 (C. C. A. 6th); *Sparks* v. *United States*, 241 Fed. 777, 789–790 (C. C. A. 6th). Compare also *Volkmor* v. *United States*, 13 F. (2d) 594, 595 (C. C. A. 6th), with *Billiter* v. *United States*, 23 F. (2d) 678, 679 (C. C. A. 6th).

York Central R. R. Co. v. *Johnson*, 279 U. S. 310. A statement of the facts in these cases will show how radically different is the conduct complained of in the present case.

In the *Berger* case, where the evidence against the convicted defendant was declared to be "weak," the conduct of the prosecuting attorney was described as follows (295 U. S. 78, 84, 85):

> He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner. * * *
>
> The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.

In short, as this Court said (p. 89), the misconduct "was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

In the *New York Central* case the Court said (p. 318) that respondent's counsel had made "a bitter and passionate attack on petitioner's conduct of the case, under

circumstances tending to stir the resentment and arouse the prejudice of the jury." It also said (*ib.*): "The failure of the trial judge to sustain petitioner's objection or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, *and thus its prejudicial effect was enhanced.*"

We submit that in the present case, after a trial of great length and the introduction of a great mass of evidence establishing the character of defendants' combination and respondents' participation therein, certain isolated remarks made by Government counsel in the course of extended argument to the jury could not reasonably be regarded as having improperly swayed the jury's verdict even if timely objection thereto had been taken and the trial court had declined to take corrective action. *A fortiori* is this conclusion required in view of the fact that the remarks now alleged to be prejudicial either were not objected to at the time they were made or, when objection was made, the jury was instructed to disregard them.

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160. This constitutes a narrowly limited exception to the general rule that the verdict of a jury will not be set aside for error not brought to the attention of the trial court. This rule is not a

technicality but "is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact." *United States* v. *Atkinson, supra,* p. 159.

In *Crumpton* v. *United States,* 138 U. S. 361, 364, the Court, in holding that argument by a prosecuting officer in a criminal case to which no objection was made at the time of the argument was not a ground for reversal, said:

> There is no doubt that, in the excitement of an argument, counsel do sometimes make statements which are not fully justified by the evidence. This is not such an error, however, as will necessarily vitiate the verdict or require a new trial. It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception.

Timely objection is, as we have seen, a necessary requirement in the interest of the orderly conduct of litigation. Otherwise, statements by opposing counsel could go unchallenged at the time when, if improper, they might be corrected, and yet could be made the basis for reversal after it was too late to correct them. But another reason why courts will not reverse in the absence of objection to remarks of counsel (later alleged to be prejudicial) is that if opposing counsel was "not then so impressed with the significance of the misstatements as to call the court's attention thereto," it "may safely be said that * * * it is not likely that

they materially affected the jury." *Dale* v. *United States,* 66 F. (2d) 666, 667–668 (C. C. A. 7th).

In the case at bar the opinion of the court below refers to the reading by Government counsel of an excerpt from a Graduation Day speech delivered in 1873 by a former Chief Justice of the Wisconsin Supreme Court (R. 3949). At the trial defense counsel interposed no objection whatever to the reading of this excerpt (R. 2041). Likewise, in the case of those portions of the argument quoted in the footnote to the court's opinion (R. 3949), no objection was taken to the second, third, and seventh of the seven separate extracts there quoted (R. 2040, 2145, 2366).

The only portion of the argument which seems to be open to substantial criticism is that in which one of the Government counsel[3] undertook to contradict, on the basis of personal experience, a factual statement made by one defense witness (R. 3950).[4] But when objection was taken to these remarks, Government counsel stated "I will withdraw the statement" and the court instructed the jury to disregard it (R. 2378). *Dunlop* v. *United States,* 165 U. S. 486, 498, held that a statement

[3] Of the nine statements by Government counsel referred to by the court below, six (and the only ones which could possibly be regarded as of any consequence) were made by W. P. Crawford. Mr. Crawford, who is a member of the Wisconsin bar (R. 2371), was specially retained for the present case. He did not either examine (with the exception of one minor witness) or cross-examine witnesses on behalf of the Government.

[4] The statement contradicted, which the court below said "was regarded by appellants as important" (R. 1950), clearly involved a mere minutia of the evidence.

outside of the testimony made by a prosecuting officer in a criminal case was not a ground for reversal when, upon exception being taken, the trial court held that the statement was improper and the prosecuting officer thereupon withdrew it. This Court said that under these circumstances, "the error will generally be deemed to be cured." It said further: "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand."

Corrective action was likewise taken in the case of the statements quoted in the first, fifth, and sixth, paragraphs of the note to the opinion of the court below. As we have seen, the economic power of the defendants was one of the principal issues in the case. But the first of these statements, made in the opening statement to the jury (R. 90–1), was objected to as improperly emphasizing the wealth and corporate power of the defendants. Government counsel having thereupon expressed willingness that the court instruct the jury to disregard it, the jury was at once instructed (R. 95) that "any reference to the wealth of any of the defendants is entirely immaterial. A man of wealth has just as much right in a court as a man that is poverty-stricken."

The statement quoted in the fifth paragraph implied that the institution of the present proceedings against the defendants was approved by the Secretary of the Interior. When a like statement by the same counsel was objected to a little later, the court instructed the jury to disregard the statement and Government counsel withdrew it (R. 2370).

The statement quoted in the sixth paragraph, made in the closing argument (R. 2365), stressed the corporate wealth and power of the defendants. Upon objection to a like remark immediately preceding the one in question, the court stated that it would, in its instructions to the jury, caution that body not to be influenced by statements of this nature (*ib.*). The court in its charge to the jury instructed it that it was "to be governed solely by the evidence submitted in this case" (R. 2419). It further charged (*ib.*):

> No jury should convict a corporation of a violation of the Sherman Act solely because of its size or the extent of its business. It is your duty to give these corporations the same impartial consideration in weighing the evidence in this case and in arriving at a verdict which you would give to any individual or to any small corporation whose guilt or innocence might be left to your determination.
>
> You are not concerned with the financial condition of any of these defendants. Whether a man be rich or poor, he is entitled to the same consideration in this Court, and at the hands of this jury, and you must keep that in mind in your consideration of the evidence in this case.

V

THE DISTRICT COURT HAD JURISDICTION OF THE OFFENSE OF WHICH RESPONDENTS WERE CONVICTED

Respondents by their cross-petition for certiorari attack the holding of the Circuit Court of Appeals that the district court had jurisdiction to try them.

It is undisputed that during the period of the conspiracy the defendants were selling gasoline in the Western District of Wisconsin at prices directly based upon the spot market quotations published in the trade journals. The court below held (R. 3942–4), relying upon *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, *supra*, that the sales by the respondents at those prices constituted acts in furtherance of the conspiracy which vested the district court with jurisdiction over the offense.

In the *Trenton Potteries* case the defendants, manufacturers of sanitary pottery, were tried and convicted in the Southern District of New York under an indictment charging a combination to fix and maintain uniform prices for the sale of their product in violation of the Sherman Act. The conspiracy had not been entered into in the Southern District. The Circuit Court of Appeals reversed the conviction (300 Fed. 550) upon the ground, in part, that the trial court had erred in failing to instruct the jury as to the necessity of finding that overt acts were committed in the Southern District of New York. This Court reversed this judgment and affirmed that of the district court, holding that the trial court's failure to instruct the jury concerning jurisdiction was not error, since there had been no request for such a charge and since the evidence on this point was so clear that there was no necessity for such a charge. The Court said (pp. 403–404):

> The record is replete with the evidence of witnesses for both prosecution and defense, including some of the accused, who testified without contradiction to the course of business within the district, the circulation of price bulletins,

and the making of sales there by some of the members of the association organized by respondents. The secretary testified that, acting for the association, he effected sales within the district. All of these were overt acts sufficient for jurisdictional requirements.

We submit that the *Trenton Potteries* case is clearly controlling on the jurisdictional question presented here. Obviously, if sales within a particular district by parties to a conspiracy to maintain uniform selling prices can give jurisdiction to try the crime there, sales within a district by parties to a conspiracy formed to raise sales prices and to maintain them at fixed artificial levels are likewise acts in furtherance of the conspiracy and give jurisdiction to try the crime in such district.

Respondents' contention in the court below that sales in the trial district did not constitute acts in furtherance of the conspiracy rests upon the false premise that it was neither charged in the indictment nor established by the evidence that raising and controlling the wholesale and the retail price of gasoline in sales in the Mid-Western area (including the trial district) were within the direct purposes and principal objectives of the conspiracy. The indictment expressly charged that the defendants combined and conspired together for the purpose of raising, fixing, and maintaining their prices in sales to jobbers and consumers in the Mid-Western area, including the Western District of Wisconsin.[1]

[1] Paragraph 18 of the indictment alleges that the defendants combined together for the purpose, and with the effect, of raising and fixing spot market tank car prices, and that they "have thereby intentionally increased and fixed the tank car prices of

The district court in its charge repeatedly instructed the jury that it could find the defendants guilty only if it found that the defendants combined and conspired together for the purpose of raising and fixing the tank car price of gasoline in sales in interstate commerce in the Mid-Western area, including the Western District of Wisconsin, and for the purpose of raising the general level of retail prices in said area and district.[2] The verdict of the jury therefore constitutes a specific finding that the conspiracy was entered into for these objectives and purposes.

The jury by its verdict not only decided this question but this was the very crux of the case as submitted to the jury. The defendants from the beginning of the case admitted concerted buying in the spot markets and that this buying would have an effect in bringing

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gasoline contracted to be sold and sold in interstate commerce as aforesaid in the Mid-Western area (including the Western District of Wisconsin), and have arbitrarily, by reason of the provisions of the prevailing form of jobber contracts above described in paragraph 11, exacted large sums of money from thousands of jobbers with whom they had such contracts in said Mid-Western area (including the Western District of Wisconsin), and in turn have intentionally raised the general level of retail prices prevailing in said Mid-Western area (including the Western District of Wisconsin)" (R. 12–13). Paragraph 25 of the indictment alleges: "*In pursuance of said combination and conspiracy*" the defendant companies "have contracted to sell and have sold and have delivered large quantities of gasoline in tank car lots to jobbers within" the trial district "at the artificially raised and fixed and non-competitive prices aforesaid * * * and they have required retail dealers and consumers in said district to pay artificially increased prices for gasoline, as aforesaid, all by virtue of said combination and conspiracy *and pursuant to the purposes and ultimate objectives thereof*" (R. 17).

[2] R. 2405, 2408, 2409, 2410, 2417.

about higher prices in those markets. The contested issue was whether this was done for the purpose, as the Government charged, of enabling the defendants to exact higher prices in their sales in the Mid-Western area or solely for the altruistic purpose, as the defendants contended, of aiding independent refiners and the "industry" as a whole.

As the court below observed (R. 3943), even if there were no direct evidence of this purpose to raise prices in the Mid-Western area,[1] the circumstances of the case give rise to an almost irresistible inference that the defendants' purpose in combining to raise the spot market prices was to raise the price of gasoline in their sales to jobbers and retailers in the Mid-Western area. The defendants were buyers and not sellers in the spot market (*supra*, p. 13; R. 3943). Consequently, raising of the spot market prices, unless the price of gasoline sold

[1] The finding of the jury on this aspect of the case was, in fact, supported by substantial direct evidence, some of which is as follows: One of those present at the first meeting of the Tank Car Stabilization Committee reported: "The effect of lower tank car markets for gasoline on the retail price structure was discussed," and further reported, "It was generally assumed that all companies would come into the picture since a stable retail market requires a higher tank car market" (Ex. 177, R. 2733–4). The minutes of the District Allocators' meeting on March 13, 1935, show that Arnott in presenting the objectives of the buying programs to the meeting said: "I am presenting to you a *national picture*—that is East of the Rockies—*whereby this whole stabilization effort of markets, the holding up of normal sales market structures, the question of the realization of refineries*, the working together of those two great groups in order that we may balance this whole picture and in order that we may interest a great many buyers in this so-called surplus or homeless gasoline, can be done along organized lines" (Ex. 69, R. 2660). See, also Ex. 376 (R. 2977–8).

by the defendants in the Mid-Western area was equally raised, would operate directly to their disadvantage. Unless the jury was to shut its eyes to inducement and motive and, as the court below put it (R. 3943), to believe "that the defendants were engaged in a philanthropic endeavor," it was almost bound to conclude that the defendants' buying activities and their rigging of spot market prices were merely the means adopted to achieve the objective for which the defendants' combination was formed—to raise and maintain at controlled levels the prices at which their gasoline was sold throughout the Mid-Western area, including the trial district.

Respondents in the court below stressed the fact that their practice of selling on the basis of spot market prices in the Mid-Western area existed prior to the conspiracy and that the defendants were not charged with having agreed upon a uniform jobber contract or a uniform retail price policy (R. 3942). From this they argued that the conspiracy entailed no obligation on their part with respect to their method of sale and that, therefore, their sales in the Mid-Western area were the result of individual action and not of joint action pursuant to the conspiracy.

The answer to this is that under the terms of the conspiracy the defendants were not free to sell as they pleased in the Mid-Western area. Since the objective of the conspiracy was to raise and maintain prices for the gasoline which the defendants sold in this area and since this objective would fail if the defendants sold at prices not based upon spot market prices, an obliga-

tion to adhere to their prior practice of selling on the basis of spot market prices was implicit in their unlawful agreement. The mere fact that the obligation was to adhere to prior practice rather than to change existing practice does not make it any the less an essential and integral part of the defendants' unlawful agreement and of the means employed to achieve its objectives.

The obligation of the defendants with respect to their method of selling, of course, extended no further than was necessary to attain the objectives of the conspiracy. These objectives were fully achieved if the defendants sold on the basis of spot market prices. It was not essential to the objectives of the conspiracy that the defendants adopt any particular form of jobber contract or follow the retail price policy of any particular company, and it was, therefore, unnecessary for the Government to allege or prove that a uniform contract or a uniform retail price policy was adopted or maintained by agreement.

Respondents also contended that in the *Trenton Potteries* case there was an express agreement to sell at the minimum prices fixed by the combination. We submit that in that case, as here, the agreement to sell was merely implicit in the combination to control selling prices. But, irrespective of that, respondents' argument that there must be an express agreement to sell at artificially enhanced prices overlooks the essential nature of a conspiracy. "A conspiracy is a partnership in criminal purposes," constituted not only by agreement but by "the continuous cooperation of the

conspirators to keep it up." *United States* v. *Kissel*, 218 U. S. 601, 607–608. Selling to jobbers and consumers in the Mid-Western area at the artificially enhanced prices supplied part of the "continuous cooperation" necessary to keep the entire conspiracy alive, although there may not have been any "agreement specifically directed to that act." *United States* v. *Kissel*, at p. 608. See also *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 249.

The dissenting opinion in the court below is, we submit, based upon a fundamental misconception of the Government's position. The dissenting judge was under the mistaken impression that the sales in the trial district which the Government contends were overt acts consisted of sales of the very distress gasoline purchased in the buying programs.* As we have seen, the position of the Government is that the sales by the defendants of their own gasoline—not the gasoline purchased in the programs—at the prices which they had raised and maintained through the operation of the buying programs constituted overt acts.

Respondents in the court below relied principally upon *Rose* v. *St. Clair*, 28 F. (2d) 189 (D. C. W. D. Va.); *United States* v. *Black*, 160 Fed. 431 (C. C. A.

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*The dissenting opinion states: "Not one drop of the oil involved in the purchasing programs, which 'effectuated' the alleged conspiracy, was purchased by any of the defendants in the State of Wisconsin, and yet, the Government contends that appellants' subsequent sale in the Western District of Wisconsin of a part of this distress gasoline involved in appellants' purchasing programs, should be considered as an overt act for the purpose of giving jurisdiction to the United States District Court for the Western District of Wisconsin" (R. 3952).

7th); *Lonabaugh* v. *United States*, 179 Fed. 476 (C. C. A. 8th); and *United States* v. *Great Western Sugar Co.*, 39 F. (2d) 149 (D. C. Neb.). The first three of these cases merely hold that where two or more persons conspire to do an unlawful act and that unlawful act has been completed, subsequent acts of the conspirators are not in furtherance of the unlawful objective or in furtherance of the conspiracy for which they stand indicted. These cases have no application here, because restraint of trade in gasoline moving in interstate commerce into the Western District of Wisconsin unquestionably falls within the interdiction of the Sherman Act. Accordingly, the acts of the defendants to perfect that restraint were in furtherance of an objective made unlawful by this statute.

The decision in *United States* v. *Great Western Sugar Co., supra,* turns upon a somewhat different point. The criminal information filed in that case charged certain acts of price warfare by a beet sugar company and some of its officers to hinder a smaller competitor from building two new beet sugar factories, and that this was done for the purpose of restraining interstate commerce in sugar. The principal means to effect this restraint was to cut off the competitor's potential supply of sugar beets by contracting to buy from farmers adjacent to the proposed factories the next year's crop of sugar beets at higher prices than those previously paid them. The making of these contracts was outside the three-year period of limitations. Since the court was of the opinion that the information charged only a restraint of trade of temporary dura-

tion, ending when the price warfare (which included a temporary drop in the price of refined sugar) ended, the court held (p. 154) that the mere act of paying farmers for beets which they delivered under the contracts which were made during the price war was not in furtherance of the restraint which was charged and did not remove the statutory three-year bar on prosecution.

VI

THE DISTRICT COURT DID NOT ERR IN DENYING RESPONDENTS' MOTIONS FOR DIRECTED VERDICTS BASED ON THE GROUNDS THAT THE GOVERNMENT HAD FAILED TO PROVE AN ESSENTIAL ALLEGATION OF THE INDICTMENT AND THAT THERE WAS A PREJUDICIAL VARIANCE BETWEEN THE INDICTMENT AND THE PROOF

Respondents' contention, rejected by the Circuit Court of Appeals (R. 3936–7), that the allegations in the indictment relating to the guilt of the defendant trade journals (R. 16–17), which the Government failed to prove (*supra*, note 18, p. 15), were essential allegations as to respondents, and that therefore the district court erred in denying their motions for directed verdicts based on this ground, raises a question which depends primarily upon a construction of the indictment.

The crux of respondents' contention is that the indictment charges a single means for the effectuation of the conspiracy, of which the allegations that the journals published false prices are an essential part. We shall describe the indictment with a view to showing that the charge against respondents is separate from, and independent of, the charge against the trade journals and that the allegations relating to the guilt of the

journals constitute at most but one of several means set forth (and a relatively subordinate one), and therefore are nonessential allegations.

Prior to the allegation of the conspiracy in paragraph 18 (R. 12–13), the indictment sets forth in paragraphs 5–17 (R. 8–12) the general nature, and interstate character, of the business of the defendant major companies. These allegations show, among other things, the following: The defendant major companies market gasoline in 10 states, known as the Mid-Western area, and together control more than 85 percent of the gasoline distributed in this area. Most of the gasoline so marketed is manufactured from crude oil produced in the Mid-Continent and East Texas fields, which lie outside the Mid-Western area. About half the gasoline sold at retail in said area is distributed through jobbers. The majors uniformly sell gasoline to jobbers under contracts which provide that the price shall be calculated on the basis of the Mid-Continent (Oklahoma) spot market prices published in two named trade journals. Virtually all of the gasoline sold on the spot markets is sold by independent refiners and the total amount of gasoline sold in spot transactions constitutes less than 5 percent of the quantity of gasoline marketed in the Mid-Western area. The majors also distribute gasoline through retail dealers or directly to consumers through their own retail service stations. Spot market prices, in addition to dictating the prices at which majors sell to jobbers, also substantially dictate retail prices in the Mid-Western area because an increase in spot market prices results directly in an increase in retail prices in that area.

Following these preliminary and introductory allegations, paragraph 18 sets forth the conspiracy which is charged. This paragraph alleges that since February 1935 the defendants "have combined and conspired together for the purpose of artificially raising and fixing" gasoline prices in the Mid-Continent and East Texas spot markets, and that they have, pursuant to this purpose, "artificially raised and fixed" these spot market prices and have maintained them "at artificially high and noncompetitive levels and at levels agreed upon among them and have thereby intentionally increased and fixed" prices in sales to jobbers in the Mid-Western area and have likewise intentionally raised the general level of retail prices prevailing in said area. There is a concluding allegation, substantially in the terms of the statute, that the defendants, in so doing, have engaged in an unlawful combination and conspiracy in restraint of interstate commerce in violation of Section 1 of the Sherman Act.

It will be observed that paragraph 18 of the indictment charges a conspiracy (1) to raise and fix spot market prices and (2) thereby to raise and fix prices in the Mid-Western area. The description of the means by which the spot market prices were raised and fixed are left to subsequent paragraphs. But the means by which prices in the Mid-Western area were raised and fixed is clearly shown by the introductory allegations preceding paragraph 18, which describe the interrelation between spot market prices and prices in the Mid-Western area. These give content to the general allegations of paragraph 18 by showing that spot market prices control prices in the Mid-Western area because

(1) prices in contracts with jobbers in this area are based upon spot market prices published in the trade journals and (2) retail prices in the Mid-Western area are determined by spot market prices.

It is significant that the charge in paragraph 18 is in terms of raising and fixing prices *on the spot market* (and thereby wholesale and retail prices in the Mid-Western area), and not in terms of raising and fixing spot market prices *as published in the trade journals.* From the preceding paragraph it appears that the trade journals were the instrumentalities by which the artificial spot market prices were converted into wholesale prices in the Mid-Western area, but there is no suggestion that the prices published by the journals were fictitious or other than prices actually representative of spot market prices.

We submit that the paragraphs of the indictment which we have described constitute alone a sufficient charge against the defendants and that the subsequent allegations, including those alleging falsification of prices by the trade journals, are unnecessary allegations. The paragraphs described charge a combination to raise and fix prices by those having the power to control market price. A conspiracy of this nature is clearly unlawful under *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (*supra*, pp. 73–74). Further allegations as to the means by which the conspiracy was to be effectuated were therefore unnecessary. *Boyle* v. *United States*, 259 Fed. 803, 805 (C. C. A. 7th).

But even if we assume that some allegation as to the means by which the objects of the conspiracy were

accomplished is requisite to the validity of the indictment, the falsification of prices by the trade journals is not, as respondents contend, a single means alleged for carrying out the conspiracy. Their corrupt conduct is not only alleged as one among several means, but it is also alleged as a minor and subordinate means. A review of the remaining allegations of the indictment substantiates this.

Paragraph 19 of the indictment (R. 13) alleges that said unlawful conspiracy "has been effectuated in the following manner and by the following means, that is to say" that the defendants, "acting pursuant to the common purposes set forth in paragraph 18," have "knowingly and unlawfully engaged and participated in two concerted gasoline-buying programs hereinafter referred to as (a) the East Texas buying program and (b) the Mid-Continent buying program, for the purchase by each of them from independent refiners" of large quantities of gasoline in the East Texas and Mid-Continent fields "at uniform, high, and at times progressively increased prices." The paragraph ends, "Said buying programs are more fully described as follows."

Paragraphs 20–21 (R. 13–15), which are preceded by the heading (*a*) ***The East Texas buying program,*** give various details concerning this program, including the names of the defendant companies purchasing in the program and the names of the independent refiners from whom such purchases were made. It is also alleged that the independent refiners have "known of said unlawful purposes and have actively engaged and

cooperated in the unlawful combination and conspiracy set forth in this indictment."

Paragraphs 22–23 (R. 15–16), which are preceded by the heading, (*b*) *The Mid-Continent buying program,* contain allegations similiar to those made with respect to the East Texas buying program.

The foregoing allegations describe the precise means by which the defendants were proved to have driven spot market prices upwards and to have maintained them at high levels. In substance, it is alleged that the defendants through the buying programs reduced the supply of gasoline on the spot markets and forced spot market prices for gasoline upward by providing an outlet at high prices for a substantial amount of gasoline which otherwise would have been sold competitively on the spot market.

It is only after the two buying programs have been fully set forth, these buying programs having been alleged in paragraph 19 as the means by which the conspiracy was effectuated, that the alleged aiding and abetting by the trade journals is mentioned.

Paragraph 24[1] (R. 16–17), preceded by the heading, *Participation of market journals,* alleges that the two trade journals mentioned earlier in the indictment have materially "aided" the other defendants in effectuating the conspiracy. Thus the intentional and wrongful participation of the journals is described in terms of aid to the conspiracy rather than as being an integral part of it. The second sentence of paragraph 24 sets forth that the journals have been "the chief agencies and instrumentalities" through which the artificially

[1] Except for a concluding paragraph entitled "Jurisdiction and venue," this is the last paragraph of the indictment.

raised and fixed spot market prices affected prices in the Mid-Western area. This allegation adds nothing to the previous allegations of the indictment for, as we have seen (*supra*, pp. 139, 141), whether guilty or not, the trade journals were the instrumentalities by which spot market prices were translated into the prices at which the majors, under the provisions of their jobber contracts, sold to jobbers in the Mid-Western area.

The concluding sentence in paragraph 24 charges, in effect, that the trade journals were not merely instrumentalities in the conspiracy but corrupt instrumentalities—that while professing to publish the prices prevailing in spot sales by independent refiners to jobbers, they knowingly published prices which the defendant major companies paid to independent refiners. Since the buying programs, carried on with the cooperation of the independent refiners, enabled the conspirators to raise and control the level of spot market prices, and since these artificial spot market prices, when published in the trade journals, determined prices in the Mid-Western area, publication by the journals of the prices paid by the defendant companies in buying from independents rather than publication of prices in sales on the spot market to jobbers, was not in any respect essential to the undertaking. The fraudulent publication of prices by the trade journals charged in the last sentence of paragraph 24, if proved, would have been merely an additional means of giving effect to the objectives of the conspiracy.

Since fraudulent publication of prices by the trade journals was merely one of the means alleged whereby the objects of the conspiracy were achieved, failure of

proof as to this means was not a ground for directing verdicts of acquittal. In a Sherman Act indictment charging various means by which the conspiracy is effectuated, "not all the means alleged need be proved." *Nash* v. *United States*, 229 U. S. 373, 380.

Respondents in their cross-petition for certiorari (pp. 7–8) urge that if the indictment is construed as we contend it should be, then it charges simply a conspiracy to fix spot market prices and not a conspiracy to fix prices in the Mid-Western area. The fallacy in this argument lies in the assumption that if the trade journals were not guilty participants in the conspiracy they played no part at all in it. As we have seen, however, the indictment prior to paragraph 24 clearly alleges facts showing that the trade journals were the instrumentalities utilized by the defendants to convert the spot market prices which they raised into their prices in sales to jobbers in the Mid-Western area. That the agency utilized by the defendants to effectuate their objective in the Mid-Western area was innocent of any wrongful act of cooperation does not, we submit, make the respondents' crime any less a conspiracy to raise and maintain prices throughout the Mid-Western area, including the trial district.

Respondents in the court below also urged that the failure to prove that the trade journals published the prices paid by the defendant companies in the buying programs constituted a prejudicial variance between the indictment and the proof.[1] Since it is not clear

[1] This contention was also rejected by the court below (R. 3387–8).

from respondents' cross-petition that they will make this contention in this Court and since the argument is closely related to that just discussed we shall refer to it only very briefly.

Respondents' principal argument in support of their contention that there was a material variance was that the indictment charges a restraint of trade controlled by the holding of this Court in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, *supra*, whereas the proof establishes a restraint of trade within the holding in *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344, *supra*. This is answered by our argument on the principal issue of the case where we have undertaken to show that the case as established by the proof falls directly within the rationale of the *Trenton Potteries* case and related cases (*supra*, pp. 69–89).

Respondents completely failed in the court below to show that the alleged variance affected any substantial rights of theirs within the test laid down by this Court in *Berger* v. *United States*, 295 U. S. 78, 83, *supra*. They were not surprised by the alleged variance because they themselves introduced the evidence to disprove the charge that the journals did not publish the defendant companies' prices.[3] Compare *Washington & Georgetown R. R. Co.* v. *Hickey*, 166 U. S. 521, 532. They are adequately protected from a second prosecution for the same offense because, as shown before, the indictment describes and the proof shows precisely the offense for which they were convicted.

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[3] Exs. 1011 (R. 3783), 1024 (R. 3807).

VII

THERE WAS SUFFICIENT EVIDENCE TO GO TO THE JURY THAT DEFENDANTS' COMBINATION UNREASONABLY RESTRAINED TRADE AND THE DISTRICT COURT DID NOT ERR IN DENYING RESPONDENTS' MOTIONS FOR DIRECTED VERDICTS.

Respondents contend that there was no evidence sufficient to go to the jury that their combination unreasonably restrained trade and that the district court therefore erred in denying their motions for directed verdicts.[1] But in the court below respondents did not even attempt to lay the necessary foundation for this contention, namely, that there was no evidence adequate to support findings by the jury that their combination had the purpose and the power to raise and fix prices.

In lieu of this essential minimum showing, respondents merely detailed certain evidence which, if the jury had given it controlling weight, would have supported certain findings contrary to those which the jury actually made. All that this showing established was that there was a wealth of evidence from which opposing factual inferences might have been drawn. Since it is the function of the jury, not the court, to pass upon conflicting evidence and disputed issues of fact, respondents wholly failed to make out a proper case for granting directed verdicts.

We shall not here set forth the abundant evidence which supports the jury's findings that defendants' combination had the power and the purpose to raise and fix prices. This evidence is set forth in our pre-

[1] The court below rejected this contention (R. 8939).

vious statement of the case and reference thereto seems sufficient. See *supra*, pp. 10–12, 15–33, 47–48.

In the court below respondents sought a partial escape from the real issues raised by their contention, by relying upon an interpretation of the holding in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, *supra*, which is, we submit, entirely unwarranted. The "principle" which respondents deduced from this decision was that if a combination undertakes to remedy a trade abuse, and if there is "competition remaining", and if its effect on competition and price is only that "intended and to be expected from the very removal of the abuse," the restraint "*cannot be said* to be unreasonable and unlawful."[2]

Not only does the opinion in the *Appalachian Coals* case not support this so-called "principle" but the holding in *Sugar Institute, Inc.*, v. *United States*, 297 U. S. 553, *supra*, is directly contrary thereto. In that case this Court assumed as a basis for its decision that the giving of arbitrary, secret rebates and price concessions to particular customers had been a serious and widespread competitive evil prior to organization of the defendant trade association and that putting an end to this evil was one of the important purposes for which the association was organized. Moreover, there was "competition remaining" after the association was formed. While the members of the association (sugar refiners) agreed to adhere to their openly announced prices until prior public notice of change had been given, they did not agree upon the prices which they

[2] See respondents' (appellants') brief in the court below, p. 146.

would charge and each was left free to announce publicly at any time either lower or higher prices. There were thus the various elements which, under the "principle" deduced by respondents from the *Appalachian Coals* case, render a restraint reasonable and lawful, as a matter of law. This Court, nevertheless, held that the restraint was unreasonable and in the course of its opinion said (p. 599):

> The freedom of concerted action to improve conditions has an obvious limitation. The end does not justify illegal means. The endeavor to put a stop to illicit practices must not itself become illicit. *As the statute draws the line at unreasonable restraints, a cooperative endeavor which transgresses that line cannot justify itself by pointing to evils afflicting the industry or to a laudable purpose to remove them.*

The Court also stated (p. 598) that its holding in the *Appalachian Coals* case was "that a coöperative enterprise otherwise free from objection, which carries with it no monopolistic menace, *is not to be condemned as an undue restraint merely because it may effect a change in market conditions* where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities." This statement indicates respondents' attempted inversion of the holding in the *Appalachian Coals* case. The holding is that the mere fact that a change in market conditions has been effected by combination does not, if the change is in mitigation of recognized evils, make the restraint *unreasonable*. Respondents then invert this into a holding that the mere fact that a change in

market conditions, effected by combination, mitigates recognized evils, makes the restraint *reasonable*.

VIII

THE DISTRICT COURT'S DENIAL OF RESPONDENTS' MOTIONS FOR NEW TRIAL, AFTER GRANTING CERTAIN OTHER CORPORATE DEFENDANTS A NEW TRIAL, DID NOT VIOLATE ANY CONSTITUTIONAL OR OTHER RIGHT OF RESPONDENTS AND DOES NOT CONSTITUTE REVERSIBLE ERROR

Respondents contend that the denial of their motions for new trial, after new trials had been granted certain other defendants, violated their constitutional right to have the issues determined by a jury.[1] The premises for this contention are that a fundamental issue in the case was the possession of the power to raise and fix market prices and that the jury did not pass upon the question whether respondents, aside from the three corporate defendants granted new trials, possessed such power. The Government submits that a review of the trial proceedings will show the lack of basis for the conclusion which respondents draw from these premises.

Each of the convicted defendants filed, prior to the jury's verdict, a motion for a directed verdict, and each filed, after the verdict, a motion for a new trial (R. 1912–3, 2435). Subsequently the district court dismissed the indictment as against certain defendants upon the ground that the evidence was insufficient to

[1] The court below did not pass upon this question because of its conclusion that the case should be reversed upon other grounds (R. 2345).

sustain their conviction,[2] and on the same day it granted certain other defendants new trials upon the ground that there "was good reason to believe" that these defendants had not had "an adequate separate consideration of their defense" (R. 2490–1). The basis of respondents' present contention is the grant of a new trial to three corporate defendants.[3] For convenience we shall discuss this contention as if Standard of Indiana were the only corporate defendant granted a new trial, since our argument leads to the same conclusion whether a new trial was granted to one corporation or to three corporations.[4]

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[2] For present purposes it is immaterial whether the district court had or had not power thus to enter judgment *non obstante veredicto* (see *United States* v. *Stone*, 60 Sup. Ct. 177, *supra*). In the present connection it is the belief of the district court that it was then authorized to rule on the motions for directed verdicts, not its actual power to do so, that is significant.

[3] The question of the defendants' power to control market price concerns only the corporate defendants.

As to the one corporate defendant granted, after verdict, a directed verdict of acquittal, The Globe Oil & Refining Company (Kansas), its operations were such that the jury's determination of the question of defendants' power to control market price could not possibly have been affected by any erroneous conclusion as to its participation in the conspiracy. This corporation did not purchase gasoline from any independent refiner in 1935 or 1936 (R. 1609–10; Ex. 1004, R. 3770–1). The record does not disclose the amount of its gasoline sales in the Mid-Western area, but the combined sales therein by the three affiliated Globe companies was less than 5% of the sales of the convicted defendants (Ex. 1028, R. 3812, 3815–6).

Section 269 of the Judicial Code (U. S. C., title 28, sec. 391), provides that new trials are not to be granted for errors which do not affect the substantial rights of the parties.

[4] Of the three corporations given a new trial, only Standard of Indiana is of any importance. One of the three, Cities Serv-

It thus appears that the ground upon which Standard of Indiana was granted a new trial was, not that the evidence was insufficient to sustain its conviction, but doubt in the mind of the trial court as to whether its defense had received adequate separate consideration by the jury. And when the district court on the same day denied or failed to grant Standard of Indiana's motion for a directed verdict, this constituted an adjudi-

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ice Company, is a holding company (R. 862–4) and its operating subsidiary, Empire, is one of the respondents. The other, Barnsdall, was one of the smallest majors.

As to the importance of Standard of Indiana's operations with reference to the question of the defendants' power to control market price, the fact, emphasized by respondents, that its sales in the Mid-Western area were about one-third of the total sales by majors, is, taken by itself, misleading. This appears when consideration is given to the following circumstances:

~~of the purchases by majors (other than Sinclair) from independ-~~

(1) Standard of Indiana did not play a predominant role in the purchase of gasoline from independent refiners. A tabulation of the purchases by majors (other than Sinclair) from independent refiners shows that Standard of Indiana made no purchases at all in the East Texas field and that its purchases in the Mid-Continent field were less than 10% of the total (Ex. 747, R. 3270–1). Inclusion of Sinclair's purchases in the total would materially reduce these percentages (Ex. 1015, R. 3797).

(2) Upon the question of the defendants' power to extend the raised spot market prices to the prices at which they sold to jobbers in the Mid-Western area, Standard of Indiana was not a factor at all. It alone of all the majors did not sell to jobbers (R. 1247).

(3) As to retail prices, Standard of Indiana's practice, adopted prior to the conspiracy, of basing its retail price upon spot market prices enabled the combining defendants to translate raised spot market prices into raised retail prices. The mere fact that Standard of Indiana could, by a change in its marketing policy, substantially impair this power, does not negative its existence. For example, repeal of the Connally Act would have impaired defendants' price control to a far greater extent. Possession of power is not negatived by the fact that some change in circumstances might defeat the power.

cation that the evidence was sufficient to warrant the jury in finding that it was a party to the conspiracy. Since this adjudication is not open to review or collateral attack, the jury's determination that respondents and Standard of Indiana were parties to the conspiracy and that they had the power to control market price must be regarded as made on the basis of adequate and sufficient evidence. This being so, the jury's determination of the power which the parties to the conspiracy could exercise over market price was free from fundamental error and no constitutional or other right of respondents was violated by the denial of their motions for new trial.

In the view of the Government, it is questionable whether mere doubt as to whether a convicted defendant has had "an adequate separate consideration" of its defense is a proper ground for granting a new trial. At most, award of a new trial upon this ground involves an exercise of the trial court's discretion. Accordingly, even if it be assumed that any doubt attaching to the fairness of the jury's conviction of Standard of Indiana attaches likewise to its determination of the defendants' power to raise or control market price, the most that this assumption could establish is that it lay within the trial court's discretionary authority to grant respondents also a new trial. In other words, respondents' claim to a new trial rests on the claim thereto by Standard of Indiana and cannot rise above that claim. If, as we have seen, Standard of Indiana's claim lies within the realm of discretion, so, too, does respondents'. The trial court exercised this discretion

when it denied respondents' motions for new trials (R. 2500).

Nothing is better settled than that the action of a federal trial court in granting or denying a motion for new trial is a matter within its discretion and that its exercise of this discretion will not be reviewed either by a Circuit Court of Appeals or by this Court. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 481–482. The only circumstances which permit review are if the trial court "erroneously excluded from consideration matters which were appropriate to a decision on the motion, * * * or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced." *Fairmount Glass Works* v. *Cub Fork Coal Co., supra,* at pp. 482–483.

In the court below respondents did not even attempt to show that they came within any of these exceptions to the general rule. That the district court entertained jurisdiction of respondents' motions and of the grounds advanced in support thereof is shown by its granting of identical motions filed by other defendants (R. 2435, 2491). Nor is there anything in the record to support the contention that the district court erroneously excluded from consideration matters appropriate to its decision upon respondents' motions. A trial court is presumed, in the absence of evidence to the contrary, to have considered all matters, whether raised or not, relevant to a proper disposition of a motion for a new trial. In the present case the trial court must be assumed to have taken into consideration the results flowing from

the granting of a new trial to Standard of Indiana, a ruling which the court made on the same day on which it denied respondents' motions for new trial (R. 2488, 2491, 2500). When the record "does not contain any explanation by the trial court of the refusal to grant a new trial," such refusal "cannot be held erroneous as a matter of law" and review is not permissible. *Fairmount Glass Works* v. *Cub Fork Coal Co., supra,* at p. 485.

There is another fatal objection to respondents' contention, namely, that they did not in the trial court request a new trial upon the ground now urged. While at the time the motions for new trial were made respondents could not know which, if any, of the corporate defendants would be given a new trial, each respondent might have set forth in its motion that the granting of a new trial to any of the other leading corporate defendants would destroy the validity of the jury's determination respecting the defendants' power to raise and fix gasoline prices and would require the granting of new trials to all the convicted defendants. The failure to present this question to the trial court is in itself ground for refusing review. *Rossi* v. *United States,* 278 Fed. 349, 354–355 (C. C. A. 9th).

This Court made an analogous ruling in *Helis* v. *Ward,* 60 Sup. Ct. 283. This was a suit for specific performance of a contract. After judgment for the defendant in the district court following trial on one interpretation of the contract, the Circuit Court of Appeals, adopting a different interpretation, gave judgment for the plaintiffs. This Court held that since the facts relevant to the interpretation adopted by the Circuit

Court of Appeals had been fully established at the trial, the defendant was not entitled to have the cause remanded for a new trial. This Court rejected a contention by the defendant that on a new trial he would attack the competency and accuracy of certain evidence, which attack was immaterial to the issues at the trial. One of the reasons given for rejecting this contention was that the defendant, in its petition for rehearing to the Circuit Court of Appeals, had not urged this as a ground for remanding for new trial.

Possibly respondents will urge that the trial court acted inconsistently when it granted Standard of Indiana a new trial but denied respondents a new trial. But alleged inconsistency in the exercise of judicial discretion is not a ground for reversal. Even rational inconsistency between verdicts returned by a jury, whether rendered in a joint trial of several defendants or rendered upon different counts of the same indictment, is not a ground for setting aside the verdict.[5] Furthermore, there was no inconsistency. The question whether respondents should be given a new trial raised speculative considerations not involved in the question whether Standard of Indiana should be given a new trial. Among these additional speculative considerations are (1) whether the jury, if it had given Standard's separate defense adequate consideration, would have acquitted it and (2) whether, had the jury done so, its conclusion as to the defendants' power re-

[5] *Dunn* v. *United States*, 284 U. S. 390, 393; *Chiaravalloti* v. *United States*, 60 F. (2d) 192, 193 (C. C. A. 7th); *United States* v. *Austin-Bagley Corp.*, 31 F. (2d) 229, 233 (C. C. A. 2nd).

specting prices would have differed from that reached at the trial.

In the court below respondents cited certain cases which hold that, where judgment is reversed against all but one of two or more defendants who have been convicted of unlawfully conspiring together, such reversal requires reversal of the judgment against the remaining defendant.[6] These decisions have no application to the case at bar since here the district court did not reverse judgment against all but one of the convicted defendants. Moreover, the decisions, even if they were applicable, are of doubtful authority. Not only are they based upon an early doctrine of the common law as to the indivisibility of the crime of conspiracy, from which doctrine the conclusion has sometimes been drawn that no conviction for this crime can stand unless supported by one other conviction (*Feder* v. *United States*, 257 Fed. 694, 696–697, *supra*), but they are also opposed by contrary decisions of equal weight.[7]

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[6] *Cofer* v. *United States*, 37 F. (2d) 677, 680 (C. C. A. 5th); *Morrow* v. *United States*, 11 F. (2d) 256, 260 (C. C. A. 8th); *Feder* v. *United States*, 257 Fed. 694, 696–697 (C. C. A. 2nd).

Turinetti v. *United States*, 2 F. (2d) 15, 17 (C. C. A. 8th), and *Bartkus* v. *United States*, 21 F. (2d) 425, 428 (C. C. A. 7th), which respondents also cited, are not in point, because the reversals in these cases had the effect of establishing that there was no competent evidence sufficient to sustain the conviction of the remaining defendant.

[7] *Rossi* v. *United States*, 278 Fed. 349, 354 (C. C. A. 9th), *supra*; *United States* v. *Cohn*, 128 Fed. 615, 626 (C. C. S. D. N. Y.), affirmed *sub nomine Browne* v. *United States*, 145 Fed. 1, 13 (C. C. A. 2nd), certiorari denied, 200 U. S. 618; *Jones* v. *Commonwealth*, 72 Va. 836, 850–852. See also *Motes* v. *United States*, 178 U. S. 458, 474–476.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals be reversed and that the judgment of the district court as to each respondent be affirmed.

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